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THE  
**ONTARIO LAW REPORTS**

CASES DETERMINED IN THE SUPREME COURT  
OF ONTARIO (APPELLATE AND HIGH  
COURT DIVISIONS).

1918.

REPORTED UNDER THE AUTHORITY OF THE  
**LAW SOCIETY OF UPPER CANADA.**

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EDITOR:  
**EDWARD B. BROWN, K.C.**

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# JUDGES

OF THE

## SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

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### APPELLATE DIVISION.

#### *First Divisional Court.*

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.

“ “ JOHN JAMES MACLAREN, J.A.

“ “ JAMES MAGEE, J.A.

“ “ FRANK EGERTON HODGINS, J.A.

“ “ WILLIAM NASSAU FERGUSON, J.A.

#### *Second Divisional Court.*

THE HON. SIR WILLIAM MULOCK, K.C.M.G., C.J.Ex.

“ “ ROGER CONGER CLUTE, J.

“ “ WILLIAM RENWICK RIDDELL, J.

“ “ ROBERT FRANKLIN SUTHERLAND, J.

“ “ HUGH THOMAS KELLY, J.

### HIGH COURT DIVISION.

THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., President.

“ “ RICHARD MARTIN MEREDITH, C.J.C.P.

“ “ BYRON MOFFATT BRITTON, J.

“ “ FRANCIS ROBERT LATCHFORD, J.

“ “ WILLIAM EDWARD MIDDLETON, J.

“ “ HAUGHTON LENNOX, J.

“ “ CORNELIUS ARTHUR MASTEN, J.

“ “ HUGH EDWARD ROSE, J.

“ “ WILLIAM ALEXANDER LOGIE, J.





## MEMORANDA

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On the 30th September 1918, WILLIAM ALEXANDER LOGIE, of the City of Hamilton, in the Province of Ontario, Esquire, Barrister-at-law, was appointed a Judge of the Supreme Court of Ontario and a member of the High Court Division of the said Court and *ex officio* a member of the Appellate Division of the said Court, in the room and stead of the Honourable James Leitch, deceased.

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### CALL TO THE BAR.

---

*21st November, 1918.*

Robert Bland Johnston, Tracy Earl Carmichael, Joseph Emile Bedard, Jacob Laurence Cohen, William Howard Walter, Ashton Ray Douglas, Leo Abraham Maldaver, James Frederick Clarke Whalley, Meyer Rotenberg, Robert Elmer Fennell, Jean Charles Gaston Fontaine.

*16th January, 1919.*

Winnett Wornibe Boyd, William Kenneth Lees, Harry Booker Sweetapple Hammond, Alexander Carew McFarlane.

*6th February, 1919.*

John Arthur Christilaw, Hugh Kingsley Campbell, Arthur Beresford Mortimer, Leonard Alexander Richard, Redmond Morton Shannon Thomas, Roscoe Sherman Rodd, Armond Whitehead.

## ERRATA.

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Page 127, 2nd line from top, for "225" read "224."

Page 152, 1st line from top, after "N.S." insert "C.P."

Page 185, 13th line of head-note, for "113" read "146."

Page 289, 3rd line from bottom, for "10 O.W.N." read "1 O.W.N."

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# REPORTS OF CASES

DETERMINED IN THE

## SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[APPELLATE DIVISION.]

NEWCOMBE v. EVANS.

1917

June 7.  
Oct. 26.

1918

April 23.

*Will—Due Execution—Testamentary Capacity—Undue Influence—Evidence—Conspiracy—Testimony of Attesting Witnesses—Findings of Trial Judge—Appeal—Costs.*

In an action to establish a will made about a month before the death of the testator, leaving all his property to his wife, whom he had married about 8 months earlier, it was *held*, by CLUTE, J., the trial Judge, that the attempt of the defendant, the sister of the testator, to prove a conspiracy on the part of the plaintiff and her relatives to procure the testator's marriage to her and the making of the will in her favour, failed upon the evidence, as also the attempt to shew that the will was not duly executed, that the testator had not testamentary capacity, and that the making of the will was procured by undue influence. The trial Judge ordered that the will should be admitted to probate and that the defendant should pay the costs of the litigation.

The witnesses to the execution of the will were the plaintiff's brother and another person. The former testified at the trial, but the latter was not called as a witness by either party, although the trial Judge pointed out that he should be called and gave the parties opportunities of calling him after the close of the evidence.

The defendant appealed from the judgment at the trial, and the appellate Court, after hearing counsel, deferred the disposition of the appeal until the evidence of this person had been taken. Upon his evidence, when taken, added to the evidence taken at the trial, the Court was of opinion that the judgment of the trial Judge could not be disturbed.

*Held*, that the circumstances of the case made it one of those in which the conscience of the Court should not be satisfied as to the validity of the will until all available evidence, material to the issues between the parties, had been adduced and the plaintiff's claim well-proved.

*Held*, also, varying the judgment below, that the defendant's costs of the litigation and of the appeal should be paid out of the estate of the testator.

ACTION to establish as the last will and testament of John A. Newcombe, deceased, a testamentary writing dated the 27th October, 1915.

Proceedings were initiated in the Surrogate Court of the County of Essex by an application for letters probate; a caveat was filed; and the action thus begun was removed into the Supreme Court of Ontario. See *Re Newcombe v. Evans* (1916), 37 O.L.R. 354.

1917  
NEWCOMBE  
v.  
EVANS.

The action was tried by CLUTE, J., without a jury, at Sandwich.

*J. H. Rodd*, for the plaintiff.

*O. E. Fleming*, K.C., and *Foster*, for the defendant.

June 7, 1917. CLUTE, J.:—The plaintiff is the widow and sole legatee of John A. Newcombe, late of the city of Windsor, and the defendant is the sister and next of kin of the said Newcombe.

The deceased died on the 28th November, 1915, having first made what the plaintiff alleges to be his last will and testament, bearing date the 27th October, 1915, whereby he devised and bequeathed to his wife, the plaintiff, all his property, of every kind and nature, including all money in bank, of which he died possessed, and appointed the plaintiff sole executrix of his will, thereby revoking all former wills. Application was made by the plaintiff for probate in common form, whereupon the defendant entered a caveat, and the present action was commenced.

The plaintiff in her statement of claim sets forth the will as the last will and testament of the deceased.

The defendant pleads: (1) that she is the sister and only next of kin of the deceased; (2) that the said will was not duly executed in accordance with the provisions of the Wills Act; (3) that the deceased, at the time the alleged will purports to have been executed, was not of sound and disposing mind, memory, and understanding; (4) that the deceased, at the time of the execution of the said alleged will, did not know and approve of the contents thereof, and the execution of the said alleged will was obtained by undue influence; (5) that the procuring of the execution of the said alleged will was part of a scheme and conspiracy on the part of the plaintiff and others, members of her family, and in particular of her brother, John F. Dunwoody, a physician, of Detroit, Michigan, by which the said plaintiff was to marry the said deceased John A. Newcombe for the purpose of securing his property, and it was in further pursuance of such conspiracy that the execution of the said alleged will was so procured.

The will upon its face purports to be executed on the 27th October, 1915, in the County of Wayne and State of Michigan, in the presence of John F. Dunwoody, 79 Michigan avenue, Detroit, and Harvey H. LaVercombe, residing at 144 Pingree avenue, Detroit, Michigan.



The deceased was 65 years old at the time of his death, and had resided at Haverhill, Massachusetts, until he came to Sandwich in May, 1914. His father left an estate of from \$75,000 to \$80,000, of which his wife received one-third, and the balance was divided between his two children. Subsequently the mother died, and her two children, the deceased and Mrs. Evans, received a portion of her estate. The sister, Mrs. Evans, is now worth about \$30,000; the deceased left an estate of from \$25,000 to \$30,000.

Prior to the deceased coming to Sandwich, his habits were irregular. His sister, Mrs. Evans, who gave evidence, said that he had periodical drinking bouts—at times he drank to excess. His father having died in 1907, he lived with his mother until 1913, when she died. In 1910, the deceased himself made application, under the laws of Massachusetts, to have a “conservator” appointed to take charge of his property. This was done, and Charles R. Newcombe, his uncle, was appointed conservator under an order of the Court dated the 21st February, 1910. This control of his estate continued until his death. The appointment was made on his own petition asking the appointment of his uncle as conservator, who was duly appointed upon filing a bond satisfactory to the Court.

The petition sets forth that he has become incapacitated, by reason of mental weakness, properly to care for his property, and prays that Charles R. Newcombe “may be appointed conservator of the property of the said John A. Newcombe, agreeable to the law in such case made and provided.” The order recites that, upon hearing the petition, and it appearing that John A. Newcombe is incapable of properly caring for his property, it is decreed that a conservator be appointed of the property of the said John A. Newcombe, such conservator to have the charge and management of the said property, subject to the direction of the Court, upon giving a bond with sufficient sureties for the due performance of his trust—which having been duly given, he was appointed. The evidence shewed that the appointment of the conservator was by reason of John A. Newcombe’s drinking habits, and not from other mental weakness.

I admitted evidence in regard to the conservator being appointed, taking the view that, while it does not create a pre-

Clute, J.

1917

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v.

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sumption of incapacity to make a will, it is a fact proper for the consideration of the Court in determining the question of soundness of mind; and this is also the law of the State of Massachusetts, if that be material, as appears in the evidence given before me, reference being made for a statement of the law to the case of *Clifford v. Taylor* (1910), 204 Mass. 358.

The deceased was described, when sober, as a man well educated and intelligent, some of the witnesses said "highly intelligent." When in a drunken condition he was sent, on one or more occasions, to Foxborough, an institution for inebriates, and after a short period of detention was discharged.

When he came in 1914 to Sandwich he boarded with a Mrs. Mary Smith, sister of the plaintiff. He came there about the 20th May, 1914, and remained there until the 23rd September, 1914. During this period he was sober, and conducted himself apparently in an exemplary manner.

The plaintiff became acquainted with him at her sister's, and he asked her to marry him. She was living at this time with her mother in Detroit, and was rather an invalid, suffering from an injury received several years before in a railway accident. The family were strongly opposed to her marrying; and, so far from entering into a conspiracy as charged, did all they could to persuade and prevent the plaintiff from marrying the deceased.

On his return to his old home, he fell in with his boon companions, and took to drinking more or less. On his return to Windsor (where Mrs. Smith now resided) he was for a time more or less dissipated, and was pressing his suit, the family opposing and complaining of his drinking habits. He sobered up and for some time before the marriage did not drink.

Finding it impossible to persuade the plaintiff not to marry the deceased, her brother, Dr. Dunwoody, one of the witnesses to the will, went to the deceased's home in Massachusetts to make inquiry as to his antecedents, and inquired at the same time as to his financial condition. The family opposed the marriage to the last, the mother refusing to attend the ceremony. The evidence is that he did not drink after his marriage.

The license is dated the 31st December, 1914, but he was not married until the 14th February, 1915, owing to the family's opposition.

On or about the 3rd October, 1915, the deceased received a stroke of apoplexy, and was confined to his bed for a couple of weeks, after which he was able to take his meals at the table, and rapidly improved, so that he was able to go out alone, and his mental condition was quite clear.

On the 27th October, the deceased, John A. Newcombe, went alone across the ferry to Detroit, and called at the office of his brother-in-law, Dr. John F. Dunwoody, and asked him who did his legal work. Dr. Dunwoody replied that Mr. Moran did it. The deceased then went to the office of Mr. Edward C. Moran, at 916 Ford Building, Detroit. I accept the evidence of Mr. Moran, who was called as a witness, as to what took place in his office. He says: "I saw John A. Newcombe once. On the 27th October, 1915, he came to my office, alone, between 11 and 12 o'clock, and he asked me to draw his will. He asked me if I was Mr. Moran; he said he wanted me to draw his will. The stenographer was not there then, and I drew it with the pen, and he took it away with him. He told me how he wanted it drawn. I followed his instructions. He said he was John A. Newcombe and wanted his will drawn. Exhibit 1" (the will produced) "is what I drew without the signature. I read it to him. There was no one there to witness it, and I asked him to wait, but he said there was some one waiting for him, and he seemed to be in a hurry to get away." The witness identified the deceased as the plaintiff's husband by a photograph, and described him as a man between 65 and 66 years of age.

Dr. John Dunwoody, whose evidence also I accept, says that the deceased came back to his office in about three-quarters of an hour after he had started out to find Mr. Moran, and said he had a will, and produced it, exhibit 1 (the will propounded), which he wanted me to witness. "He said he had made his will and he wanted me to witness it." There was then in the doctor's office Mr. Harley H. Vercombe, the other witness to the will, who lives in Detroit and is the general manager of the Peninsular Tool Salvage Company. The witness introduced Mr. Newcombe to Mr. Vercombe, and Mr. Newcombe took the pen in his hand to sign, and said, "Doctor, if you will assist me I will sign," and the doctor steadied the hand of the deceased as he signed the will. Dr. Dunwoody and Mr. Vercombe then signed as witnesses. The deceased thanked them, put the will in his pocket, and left.

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The other witness to the will was not called. I stated to counsel that I desired this witness to be called. The defendant's counsel said that he was informed that the other witness had been in the court-house since the Court opened and had been seen by the defendant's detective. At the close of the argument, the defendant's counsel suggested that the other witness to the will, Vercombe, should be called by the plaintiff. I stated that, if he thought Vercombe a material witness, knowing, as he said, where he could be found, he should have produced him or had his evidence taken; and I stated further that, as Court would probably continue for a week or ten days longer, I would receive his evidence at any time before the Court arose. Just when I had finished the business at the Court a week later, the defendant's counsel again complained that the plaintiff had not called the other witness to the will. I intimated that if he desired the witness to be called he had had ample opportunity to do so. Neither side offered to call this witness.

Frank Mernicki, who carries on a taxicab business, was called as a witness, and stated that in October, 1915, the deceased had engaged him to drive him over to Detroit. He took him to the building where Dr. Dunwoody has his office, afterwards to the Ford Building, where he remained about three-quarters of an hour, when he drove him back to the doctor's. He was there for about half an hour or so, and he brought him back again to Windsor. He remembered that the deceased had said something about his will.

Helen Wesley, a stenographer in Dr. Dunwoody's office, saw the deceased in the doctor's office on the 27th October, in the reception-room. She went out to lunch and did not see him again, but she left the office before the deceased saw Dr. Dunwoody.

A witness, George Cubb, stated that he was in the doctor's office to pay a bill and sat beside the deceased. They discussed the war. He paid the bill, \$4. There is an entry of the receipt of this money in the doctor's books, and the bill receipted was produced (exhibit 10). He heard Newcombe say to the doctor, "I have made my will and I want you to sign." The doctor spoke to a man and said, "I want you to meet my brother-in-law, Mr. Newcombe;" and Mr. Newcombe said, "Gentlemen, I have had my will drawn up;" and, after it was signed, he thanked the

witnesses. He heard him say, "Would you steady my hand, Doc.?" He fixes the date by his receipt.

Mary McGarry was also in the doctor's office. She remembers the occasion and remembers the last witness, George Cubb, being there. She heard the deceased say, "I have a paper I want you to sign." The doctor said, "Come in here, John." Newcombe said, "I have had my will made, and I would like to have it signed." The doctor called a man in and introduced him. Newcombe said: "Will you steady my hand? It doesn't go very good."

Mr. Albert S. Northrup, manufacturing chemist, was also at the doctor's. He had known Newcombe before, having met him on several occasions, the last time two weeks before his death, at Dunwoody's confectionery store, kept by a sister of the plaintiff. He spoke to him about insurance, and the deceased said he had no one depending on him except his wife, and if he should go she would have enough to take care of her. He said, "I have here a will, and no insurance policy will give a better guarantee than a will." He speaks of the deceased at this time as an entertaining old gentleman.

I am satisfied that the deceased had his will prepared, and that the same was signed by him in the manner described by the plaintiff's witnesses, and that the execution of the will was not obtained by undue influence. There is not a tittle of evidence that there was any such conspiracy as charged by the defendant, or any conspiracy whatever, by which the plaintiff was to marry the deceased John A. Newcombe, for the purpose of securing his property; nor was it in pursuance of any such alleged conspiracy that the execution of the will was procured; but, on the contrary, I find that at the time the will was executed the deceased was of sound mind and memory, and that the execution of the will was his own act, without influence or fraud of any kind; and I acquit the plaintiff and her family of any improper conduct whatever in regard to the execution of the said will or in connection with his said estate.

See Halsbury's Laws of England, vol. 28, p. 548, paras. 1085, 1087. A valid execution of a will may be had where the testator's hand is guided by an attesting witness: *Wilson v. Beddard* (1841), 12 Sim. 28; Jarman on Wills, 6th ed., p. 107; and it is immaterial that the witness is not told that it is a will: *ib.*, p. 114; *In Bonis Moore*, [1901] P. 44.

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I find that the will in question was duly executed by the said John A. Newcombe; that he was of sound mind and memory when he so executed the same; that such execution was not obtained by fraud or undue influence; and that the will should be admitted to probate.

I think it only fair to say, having regard to the serious charge made by the defendant against Dr. Dunwoody, that there was not a tittle of evidence from first to last to justify such charge.

The plaintiff is entitled to costs.

The defendant appealed from the judgment of CLUTE, J.

October 9, 1917. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

*D. L. McCarthy*, K.C., for the appellant, argued that the evidence shewed lack of mental capacity, undue influence, and conspiracy, as charged. In the peculiar circumstances of the case, the onus was upon the plaintiff of proving in the strictest manner possible the validity of the will, and that it was the voluntary act of the testator. The plaintiff should have called the second witness to the will to give evidence. This witness had been in Court during the trial.

*J. H. Rodd*, for the plaintiff, contended that he had satisfied any onus that lay upon him of establishing the validity of the will. The defendant could have called the other witness to the will if he had so desired. Counsel relied upon the findings and conclusions of the trial Judge.

*McCarthy*, in reply.

October 26, 1917. MEREDITH, C.J.C.P.:—The age, and mental and physical condition, of the alleged testator; the manner in which, and the circumstances under which, his marriage to the plaintiff was brought about; and the time when, and circumstances under which, the alleged will is said to have been made; put upon them who propound, and support, the will, the onus of proof of "the righteousness of the transaction," under which it is said that all of the alleged testator's property passed to the plaintiff; that is, proof of the due execution of the will by a competent testator not unduly influenced in making it.



And, under all the circumstances of the case, I cannot think that that onus was satisfied without the testimony of the second attesting witness to the alleged will, having regard to the fact that the other attesting witness was the plaintiff's brother, and the person who seems to have been a moving spirit in these strange occurrences.

The other attesting witness should be examined as a witness in this action, before this Court now; and the final disposition of this appeal should be deferred until his testimony has been given.

Any question as to the time when, and the manner in which, such testimony may be given, can be disposed of on an application to any member of this Court at Chambers.

RIDDELL, LENNOX, and ROSE, JJ., agreed in the result.

*Direction accordingly.*

January 14, 1918. The case was mentioned to the Court, and it was directed that the evidence of the witness Vercombe should be taken in Detroit and returned to the Court.

The evidence was so taken and returned.

April 23. MEREDITH, C.J.C.P.:—In view of the additional evidence adduced by the plaintiff, by leave of this Court, since the trial of this action, the judgment, pronounced at that trial, establishing the will propounded by the plaintiff, cannot well be disturbed; though, but for that additional evidence, I should have been in favour of allowing this appeal and dismissing the action.

There were circumstances connected with the case which made it one of those in which the conscience of the Court should not be satisfied as to the validity of the will until all available evidence, material to the issues between the parties, had been adduced and the plaintiff's claim well-proved.

Having regard to the learned trial Judge's findings, and to the additional evidence, I am not able to find that that has not now been done.

But the case is one in which the defendant should have her costs of the litigation, throughout, out of the estate of the testator:

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down to and including the trial, because the case was one requiring careful investigation and one in which strict proof of the validity of the will was needed, proof of which all persons disappointed by it had a right to demand; and of this appeal, because it was well-brought, the plaintiff retains her judgment largely upon the evidence adduced by her, by the leave of this Court, since the trial, evidence which should have been adduced by her at the trial.

RIDDELL, J.:—I agree in the disposition of the case as set out in the judgment of the Chief Justice.

LENNOX and ROSE, JJ., also agreed.

*Judgment below varied.*

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[MASTEN, J.]

April 23.

JOHNSON & CAREY Co. v. CANADIAN NORTHERN R.W. Co.

*Constitutional Law—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140—Power of Ontario Legislature to Create Lien Effective against Dominion Railway—Jurisdiction of Court to Award Personal Judgment where Lien-claim not Enforceable—Sec. 49 of Act—Jurisdiction of Officers to Try Actions under Act—County or District Court Judge—Sec. 33 of Act (6 Geo. V. ch. 30, sec. 1)—Intra Vires.*

A lien claimed under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, cannot exist or be enforced against the property of the Canadian Northern Railway Company—a Dominion company.

*Crawford v. Tilden* (1907), 14 O.L.R. 572, followed.

Although the lien claimed cannot be enforced in an action brought under the Act, the plaintiff may proceed to judgment under sec. 49.

*Kendler v. Bernstock* (1915), 33 O.L.R. 351, and *Baines v. Curley* (1916), 33 O.L.R. 301, applied.

The provisions of sec. 33 of the Act, as enacted by the amending Act, 6 Geo. V. ch. 30, sec. 1, are *intra vires* of the Ontario Legislature, so far as it is thereby directed that an action brought under the Act shall be tried, outside of the County of York, before a Judge of the County or District Court of the county or district in which the land is situate.

PURSUANT to an order made by MIDDLETON, J., in the Weekly Court, on the 19th June, 1916 (see 10 O.W.N. 372), the issues of law arising in the action were tried by MASTEN, J., in Court, in Toronto.

A. C. McMaster, for the plaintiffs.

W. N. Tilley, K.C., and A. J. Reid, K.C., for the defendants  
the Canadian Northern Railway Company.



*H. S. White*, for the defendants *Foley Welch & Stewart*.

By direction of the Court, the Attorney-General for Canada and the Attorney-General for Ontario were notified.

The former stated that he did not desire to be heard; the latter submitted a written memorandum.

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April 23. *MASTEN, J.*:—This is an action to enforce a mechanics' lien. Under an order of *Middleton, J.*, dated the 19th June, 1916, certain preliminary questions raised by the defendants the Canadian Northern Railways Company were directed to be determined before the other questions raised in the action.

As set forth in that order, the questions so to be determined are as follows:—

(1) Can a lien claimed under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, exist or be enforced against the property of the Canadian Northern Railway Company referred to in the amended statement of claim in this action, under the circumstances therein alleged?

(2) If not, can the plaintiffs proceed to obtain judgment under sec. 49 of the Act, or otherwise in these proceedings?

(3) Are the provisions of the said Mechanics and Wage-Earners Lien Act, conferring jurisdiction on the special officers referred to in sec. 33 of the said Act, *intra vires*?

By agreement of parties, the taking of evidence is waived, and the action is set down for hearing, in respect to the questions above mentioned, upon the allegations in the statement of claim.

Notwithstanding the able argument of Mr. McMaster, I am unable, on the first question, to distinguish this case from *Crawford v. Tilden* (1907), 14 O.L.R. 572; and my answer to it must, therefore, be in the negative. That being the conclusion, it would be impertinent for me further to discuss the point.

With respect to the second question above stated, I am referred to *Kendler v. Bernstock* (1915), 33 O.L.R. 351, 22 D.L.R. 475, and have also considered *Baines v. Curley* (1916), 38 O.L.R. 301, 33 D.L.R. 309; *Benson v. Smith & Son* (1916), 37 O.L.R. 257, 31 D.L.R. 416; and *In re Sear and Woods* (1893) 23 O.R. 474.

In *Baines v. Curley*, 38 O.L.R. 301, *Riddell, J.*, lays it down, at p. 305, that "any person claiming a lien can commence the action," and *Meredith, C.J.C.P.*, says (p. 303) that "it may

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be that secs. 31 and 32 should be held to cover any action brought in good faith to enforce a lien." These expressions are very wide; and, when coupled with the actual decision in *Kendler v. Bernstock*, seem to require that the answer to the second question shall be in the affirmative, even though it has the anomalous result of establishing the jurisdiction of the Court to award judgment by the mere assertion of a lien-claim, unfounded not only in fact but in law.

With respect to the third question above stated, it appears to me that no difficulty arises in this case. The action is, by the amendment\* to the Ontario statute, to be tried before the Judge of the District Court of Rainy River—a Judge appointed by Dominion authority. The administration of justice in the Province, including procedure in civil matters, belongs, under the British North American Act, exclusively to the provincial authority; and, if that authority chooses to direct that, though the papers are filed in the Supreme Court, a particular class of actions shall proceed to trial before the Judge of the County or District Court of the county or district wherein the cause of action arose, it seems to me that such an enactment is within the scope of provincial authority.

My answer to question 3 is, therefore, in the affirmative.

Judgment accordingly. Costs to be costs in the cause.

[An appeal by the defendants the Canadian Northern Railway Company and a cross-appeal by the plaintiffs from the judgment of MASTEN, J., were heard by a Divisional Court on the 2nd October, 1918. Judgment was reserved.]

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\*See an Act, passed in 1916, to amend the Mechanics and Wage-Earners Lien Act, 6 Geo. V. ch. 30, sec. 1, which is as follows:—

1. Section 33 of the Mechanics and Wage-Earners Lien Act is repealed and the following substituted therefor:—

33. The action shall be tried in the County of York before the Master in Ordinary or the Assistant Master in Ordinary, and outside of the County of York, before a Judge of the County or District Court of the county or district in which the land is situate.

[IN CHAMBERS.]

1918

April 26.

BOSTON LAW BOOK CO. v. CANADA LAW BOOK CO. LIMITED.

*Parties—Addition of Defendants—Rule 67—Improper Joinder—Distinct Contracts between Different Parties—Service on Added Defendants out of Ontario—Rule 25 (1) (g)—Discretion—Rule 67 (2).*

British publishers of a reprint of English Law Reports issued a prospectus, prior to publication, estimating that each set would contain about 150 volumes of about 1,500 pages each. The sets were sold at a fixed price per volume. The plaintiffs, sellers of law books in the United States of America, made an agreement with the British publishers to take a certain number of sets, at a stipulated price per volume; and, as part of their plan for disposing of their sets, made an agreement with the defendants, doing business in Ontario, to sell them a certain number of sets, at a named price. This agreement was made on the faith of the prospectus. There was no contract between the publishers and the defendants. The publishers cut down the number of pages in the volumes, so that when 150 volumes had been issued, the reprint had not been completed, and it was expected that the sets would run to 200 volumes. When the volumes reached 150, the defendants refused to pay for the additional volumes; and, volumes 151-154 having been delivered, the plaintiffs sued the defendants for the price. The defendants pleaded that they had paid the full price and asked for a declaration that they were entitled to the remaining volumes without further payment. An order was made, on the application of the plaintiffs, adding the British publishers as defendants, permitting service to be made upon them in Great Britain, and allowing the plaintiffs to amend their statement of claim by setting out the contracts and the contention of the defendants, and by claiming a declaration that, if the original defendants should succeed in their contention, the added defendants should be declared liable, for the reason that the prospectus was theirs, and the default, if any, theirs:—

This order was set aside on appeal, it being held that (the two contracts being quite distinct and between different parties) the added defendants were not proper parties to the action brought against the original defendants (Rule 25 (1) (g)), applying the criterion of Rule 67, relating to the joinder of parties and of causes of action.

*Oesterreichische Export A.G. v. British Indemnity Insurance Co. Limited*, [1914] 2 K.B. 747, distinguished.

Held, also, that the right to allow service out of Ontario is one which must be exercised in accordance with a sound judicial discretion; Rule 67 (2) enables the Court to deal with the case if the joinder is deemed oppressive or unfair; and no sound principle could justify the bringing in Ontario of an action by foreigners against defendants in Great Britain, upon a contract neither made nor to be performed within Ontario.

AN appeal by W. Green & Son Limited and Stevens & Sons Limited from an order of the Master in Chambers dismissing an application made by these appellants to set aside an order made by the Master himself, on the *ex parte* application of the plaintiffs, allowing the plaintiffs to amend the writ of summons and statement of claim by adding the appellants as defendants, making a claim against them, and permitting service upon them out of the jurisdiction, and to set aside the service effected on the appellants



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pursuant to the order—one of the added defendants carrying on business in Scotland and the other in England.\*

April 20. The appeal was heard by MIDDLETON, J., in Chambers.

*R. H. Parmenter*, for the added defendants, the appellants.

*Alfred Bicknell*, for the plaintiffs.

*R. T. Harding*, for the original defendants.

April 26. MIDDLETON, J.:—W. Green & Son Limited and Stevens & Sons Limited, carrying on business at Edinburgh, Scotland, and London, England, respectively, jointly published a reprint of the English Reports down to the year 1866, and issued a prospectus, prior to publication, estimating that each set would contain about 150 volumes of about 1,500 pages each. The sets were sold at a fixed price per volume.

The plaintiffs, who carry on business at Boston, became “agents” for the sale of this publication in America, and made an agreement dated the 17th May, 1901, based on an earlier option of April, 1900, with the publishers, to take a certain number of sets, at a stipulated price per volume.

The plaintiffs, as part of their plan for disposing of the work, entered into an agreement, dated the 5th June, 1900, with the original defendants, the Canada Law Book Company, to sell them a certain number of sets, at a named price. This agreement was made on the faith of the prospectus issued. This Canadian company were made “agents” for Canada.

For convenience and to save double duty, the copies intended for Canada were sent direct from the publishers to the Canada

\*The following Rules are referred to:—

25.—(1) Service out of Ontario of a writ of summons or notice of writ may be allowed wherever:—

(g) A person out of Ontario is a necessary or proper party to an action brought against another person duly served within Ontario.

67.—(1) Where the plaintiff claims that the same transaction or occurrence, or series of transactions or occurrences, give him a cause of action against one or more persons, or where he is in doubt as to the person from whom he is entitled to redress, he may join as defendants all persons against whom he claims any right to relief, whether jointly, severally, or in the alternative; and judgment may be given against one or more of the defendants according to their respective liabilities.

(2) The Court may order separate trials or make such other order as may be deemed expedient, if such joinder is deemed oppressive or unfair.

Law Book Company, but there was no contract between the publishers and that company.

The publishers, instead of including 1,500 pages in a volume, cut down the pages, it is said, to a great extent; and this, it is asserted, will result in the sets running to about 200 volumes each.

When the volumes reached 150, the Canada Law Book Company refused to pay for the additional volumes, alleging that the increase in the number of volumes resulting from the decrease in the number of pages stated in the prospectus, constituted a defence to the claim made for the price of the further volumes. Some four volumes, 151, 152, 153, and 154, having been delivered, this action was brought on the 21st September, 1916, against the Canada Law Book Company for the price.

The defendants in this action filed a defence and counterclaim, setting out their contention, and asking a declaration that they are entitled to the remaining volumes without further payment.

On the 20th August, 1917, an order was made by the Master in Chambers adding the publishing companies as parties defendants, and allowing an amendment to the statement of claim.

By this amendment, the contracts are set out and the contention of the Canadian company, and it is then asked that if these defendants should succeed in their contention, the added defendants should be declared liable, for the reason that the prospectus was theirs, and the default, if any, theirs.

I do not think the order in review can be sustained. The clause of Rule 25 (1) relied upon is (g). The added defendants are said to be proper parties to the action against the original defendants.

It is well established that the criterion to be applied is Rule 67, relating to the joinder of parties and of causes of action.

All parties may be joined as defendants against whom a claim for relief may be made, if the right to relief arises from the same transaction or occurrence. The claim here is against the publishers by reason of a contract made with them, and the claim against the Canadian company is upon a contract made with that company. These contracts are or may be similar, and the rights of the parties may in large measure depend upon the resolution of a question of fact, or a question of law and fact, as to the meaning and effect of the prospectus, and whether the publication is a

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compliance with the representations contained in it; but the action is upon two distinct contracts, made between different parties, and it may be under widely different circumstances, and the claim of the plaintiffs against the original defendants is the opposite of the claim against the added defendants.

Plaintiffs may join as against a common defendant when a common question of law or fact will arise (see Rule 66), but defendants cannot be joined unless the transaction gives the plaintiff "a cause of action against one or more persons" and affords to him a claim "jointly, severally, or in the alternative" against them (Rule 67).

Under the English Rule, which is not the same as ours, a case, which carries the matter beyond any other, determines that, when underwriters each insured goods for separate amounts under one policy, and the goods were destroyed, this gave the right to claim against the defendants "jointly, severally, or in the alternative" in one action: *Oesterreichische Export A.G. v. British Indemnity Insurance Co. Limited*, [1914] 2 K.B. 747. This falls very far short of any justification for the joinder here—even bearing in mind the wider provisions of our Rule.

Another consideration is of importance. The right to allow service out of Ontario is one which must be exercised in accordance with a sound judicial discretion. The right is not absolute in any case; and, when it is sought to justify an order under Rule 25 (g) and Rule 67, in addition to the general discretion possessed by the Court, there is the express provision of Rule 67 (2) enabling the Court to deal with the case if the joinder is deemed oppressive or unfair.

The Boston Law Book Company are well within their rights when they seek to enforce their contract with a Toronto company in the Courts of Ontario, but no sound principle can justify the bringing in Ontario of an action by a Boston company against defendants in England and Scotland, upon a contract neither made nor to be performed within this Province.

The assumption of jurisdiction by our Courts over a contract made abroad, by those who owe us no allegiance, seems to me most improper and objectionable.

The appeal should be allowed, and the service out of the jurisdiction should be set aside, with costs to be paid by the



plaintiffs to the added defendants forthwith, and to the original defendants in any event of the action.

[An appeal by the plaintiffs from the order of MIDDLETON, J., was dismissed by a Divisional Court on the 12th June, 1918. The reasons for the decision of the Divisional Court will be reported in due course.]

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April 26.

[APPELLATE DIVISION.]

MACKAY v. CITY OF TORONTO.

*Municipal Corporations—City Corporation—Services of Accountant Employed by Mayor—Remuneration—Absence of By-law—Contract—Execution—Adoption—Ratification—Benefit of Services.*

The judgment of MIDDLETON, J., 39 O.L.R. 34, affirmed.

*Held*, that the contract was not an executed one in the sense that the defendants' council, knowing the facts, accepted the result of the plaintiff's labours and ratified the agreement made with the Mayor; the case did not come within the class of cases where a corporation may be bound without a formal contract or by-law; the plaintiff had misconceived the nature of the work which the Mayor requested him to do; and he could not recover. *Waterous Engine Works Co. v. Town of Palmerston* (1892), 21 S.C.R. 556, followed.

*Pim v. Municipal Council of Ontario* (1855), 9 U.C.C.P. 304, distinguished.

AN appeal by the plaintiff from the judgment of MIDDLETON, J., 39 O.L.R. 34.

February 4, 5, 6, and 7. The appeal was heard by MACLAREN, MAGEE, and HODGINS, J.J.A., RIDDELL, J., and FERGUSON, J.A.

A. W. Anglin, K.C., and Glyn Osler, for the appellant. The learned trial Judge held that there was no contract between the parties, and that the defendants were not precluded from setting up as a defence the absence of a by-law of the corporation, citing in support of that contention *Waterous Engine Works Co. v. Town of Palmerston* (1892), 21 S.C.R. 556. It is submitted that he erred in his interpretation of the facts and of the law applicable thereto, and as to the effect of the *Waterous* case. Investigation into the various steps taken in the negotiations between the Mayor and the plaintiff, as disclosed by the evidence, shews that the scope of the instructions given to the plaintiff in the first instance was subsequently very much broadened, so as to include



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the purchase of the assets of the Toronto Railway Company, as well as those of the Toronto Electric Light Company. The trial Judge has failed to recognise the change in the plaintiff's instructions from this standpoint. What was contracted for was an investigation and report upon the whole situation, as it developed from time to time, involving a full report upon the financial standing of both companies, viewed in relation to the proposed purchase of both undertakings. The judgment of Strong, J., in the *Waterous* case, at p. 561, refers to his judgment in the prior case of *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581, in which, however, his view was not in accordance with that of the majority of the Court. In our view the *Waterous* case has not the effect attributed to it by the trial Judge; the contract in this case is a fully executed contract, to all intents and purposes, and does not require the formality of a seal. Reference was also made to *Township of King v. Beamish* (1916), 36 O.L.R. 325, 30 D.L.R. 116, and to the note as to the *Waterous* case at the foot of p. 15 of Meredith & Wilkinson's Canadian Municipal Manual; also to *Pim v. Municipal Council of Ontario* (1855), 9 U.C.C.P. 302, reversed on appeal, *ib.* 304, a case which is still an authority for the proposition that a corporation is bound by an executed contract in the absence of a by-law; *Perry v. Corporation of Ottawa* (1864), 23 U.C.R. 391; *Canada Central R.W.Co. v. Murray* (1883), 8 S.C.R. 313. [MACLAREN, J.A., referred to the line of cleavage between cases dealing with commercial and municipal corporations, and doubted whether those of the former description could be taken as a guide in dealing with the latter.] Reference was also made to the following cases: *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772; *Campbell v. Community General Hospital of the Sisters of Charity Ottawa* (1910), 20 O.L.R. 467, 474, 475; *Wright v. City of Ottawa and Ottawa Dairy Co.* (1914), 7 O.W.N. 151, 19 D.L.R. 712; *Nicholson v. St. Catharines Collegiate Institute Board* (1916), 11 O.W.N. 236; *Macartney v. County of Haldimand* (1905), 10 O.L.R. 668; *Leslie v. Township of Malahide* (1907), 15 O.L.R. 4, 7; *Ponton v. City of Winnipeg* (1908) 41 S.C.R. 18; *Hoare v. Kingsbury Urban District Council*, [1912] 2 Ch. 452, 464.

A. C. McMaster and C. M. Colquhoun, for the respondent corporation, argued that the judgment of the learned trial Judge was

correct in fact and in law, and relied upon the cases there cited in support of the conclusions arrived at. They referred especially to the *Waterous* case, *supra*; *Taylor v. Gage* (1913), 30 O.L.R. 75; *Regina v. Henderson* (1898), 28 S.C.R. 425; *Ponton v. City of Winnipeg*, *supra*; *District of North Vancouver v. Tracy* (1903), 34 S.C.R. 132; *Manning v. City of Winnipeg* (1911), 21 Man. R. 203; *Clarke v. Guardians of Cuckfield Union* (1852), 21 L.J. Q.B. 349; *Young v. Corporation of Leamington* (1883), 8 App. Cas. 517; *Marsh v. Joseph*, [1897] 1 Ch. 213. The defendants had received little or no benefit from the services rendered by the plaintiff, of which they had never made any use. He never gave the Mayor any warning that he intended to charge the defendants more than \$5,000 or thereabouts. His report was really the work of an advocate, rather than that of a skilled expert, as is shewn by the expectation on his part to receive a much larger sum in case the transaction went through. On the question of ratification, reference was made to Dillon's *Municipal Corporations*, 5th ed., p. 1190 *et seq.*, and to *Paul v. City of Seattle* (1905), 82 Pac. Repr. 601, 605.

*Anglin*, in reply.

April 26. MACLAREN, J.A.:—This is an appeal by the plaintiff from a decision of Middleton, J., of the 26th February, 1917, reported in full in 39 O.L.R. 34, dismissing the plaintiff's action, which had been brought to recover \$42,546.50 for professional services as an accountant and for disbursements in connection with a proposed purchase by the defendants of the Toronto Railway Company and the Toronto Electric Light Company.

The broad ground on which the judgment was based was, that the defendants had never contracted with the plaintiff under seal or as required by the Municipal Act, and that the case did not fall within the class of cases in which such a formality might be dispensed with.

The trial Judge has carefully reviewed the leading recent English and Canadian cases which bear upon the points involved, and I quite agree with the conclusions at which he has arrived, as to the general result of the authorities and as to the effect of the evidence.

It was strongly urged upon us by Mr. Anglin that the case of

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*Pim v. Municipal Council of Ontario*, 9 U.C.C.P. 302, 304, which was not considered or referred to by the trial Judge, was applicable to the present case, and is binding upon us as an authority. It is perhaps a sufficient answer to say that our statute-law on the subject differs widely from that in force when the *Pim* case arose, and that we are bound by the decision of the Supreme Court of Canada in the case of *Waterous Engine Works Co. v. Town of Palmerston*, 21 S.C.R. 556, determined under a statute practically similar to that in force when the present case arose.

It was also argued that this case comes within the class of cases in which it has been held that, where a contract has been entered into by or on behalf of a corporation, without being under seal or without the observance of some other required formality, the plaintiff would nevertheless be entitled to recover if it had been fully carried out and the corporation had benefited by it. Mr. Anglin cited a number of cases to establish this proposition, and to shew the distinction made in the cases between those that were fully executed and those that were merely executory. An examination of these cases shews that, where the plaintiff succeeded, the contracts under consideration had been made either with the governing body of the corporation, such as the council or board, or by its duly authorised agent or agents, or had been duly ratified. In the present case it cannot be said that the council had any knowledge that any such contract had been made with the plaintiff as he now claims, and the testimony of the Mayor, of which the trial Judge expresses his "full and unqualified acceptance," shews that he had no idea that he was entering into any such contract in his dealings and communications with the plaintiff; and, even if he had, it had not been fully carried out and could by no means be called an executed contract. The only report made by the plaintiff was designated by him an "interim report," and the final report had not been made even at the time of the trial. Nor can it be said that the defendants had in any way benefited by it. The only part of the work or material by which the defendants might ultimately have benefited was the information derived from the books of the companies, and that he received under a promise of secrecy, and no part of it was communicated to the defendants.

In a number of the cases the requirement of a seal or some other formality was held dispensed with on account of the subject-



matter of the contract being comparatively unimportant, or a matter of routine or of frequent occurrence. There is no evidence in this case nor is it at all probable that the plaintiff had ever previously been called to advise where the sum of \$30,000,000 had been even thought of or mentioned as the possible value of the property in question, or that he had ever previously thought of making a charge of \$100,000 in the event of his advice being accepted and the campaign in favour of the purchase recommended resulting favourably; and it was probably equally novel to the city council.

He was asked and urged by the Mayor, at the outset, to give an estimate of what his work would cost, and was informed that the city council had first voted \$5,000 and afterwards \$10,000 for the fees and disbursement of the other experts, Ross and Arnold; and the inference is, that the Mayor expected that his remuneration would be somewhat on the same scale, and apparently the plaintiff did nothing to remove this impression.

I am of opinion that the plaintiff entirely misconceived his position and what was required of him. He was requested by the Mayor practically to furnish him with the material which from the point of view of a financial and business man would be useful in convincing the city council, the electors, and others to be influenced in a prospective campaign in favour of the purchase by the defendants of the two companies in question.

At the trial, the Judge was requested by both parties to express his view as to the amount which the plaintiff would be entitled to receive, in the event of his right to recover being established. No such request was made to us, so that I refrain from expressing any opinion respecting the sum named by the trial Judge.

In my opinion, the appeal should be dismissed.

MAGEE, J.A., agreed with MACLAREN, J.A.

RIDDELL, J.:—This is an appeal by the plaintiff from the judgment of Mr. Justice Middleton at the trial: 39 O.L.R. 34.

The facts are set out in the reasons for judgment in some detail, and most of them are not in dispute. In the view which I take of the case, it is not necessary to disbelieve or discredit the plaintiff, or even to discount his statements; he seems to me to disprove his own case.

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It must be obvious that the employment of the plaintiff was not of that trivial or everyday character which the cases enable us to hold sufficient without a formal contract or by-law.

The plaintiff (assuming as I do his perfect honesty) clearly understood that he was being employed to give an opinion of the advisability, from a practical and business point of view, of a purchase involving \$30,000,000; that it was his opinion that would prevail with the Mayor, and, through the Mayor and other means, with the council responsible for the policy of the city. It is quite clear that he expected to be better paid if the scheme should go through than if it should fail; and it is equally clear that he, very early and before he could possibly have examined into the situation with any degree of fullness, began to prepare for an acceptance of the scheme.

He was convinced (and reminded the Mayor) of "the importance and necessity of convincing the Provincial Commission and the public of the wisdom and advantages of the proposed purchase." Indeed from the very beginning he assumed his employment to be to find reasons why the scheme should go through. Whether it was within the powers of the council to employ any one for these purposes—and I am inclined to think it was not—the employment was of such an extraordinary nature that it called for the utmost formality.

I do not think it necessary to go into the distinction (if any) between executed and executory contracts in this connection. The law cannot be said to be in a perfectly satisfactory state, and probably the last word has not been said. There was no executed contract in the sense that the council, knowing the facts, accepted the results of the plaintiff's labours. He had not even furnished what he set out to do—his "final report" was never delivered. Any acceptance there was, was without a knowledge of the facts—and any so-called ratification was in the same condition. No council would pay the slightest attention to the argument of an expert, however able or eminent, who expected \$100,000 if his advice were followed, but only \$37,500 if it were rejected.

I would dismiss the appeal.

I should add that the amount fixed by Mr. Justice Middleton as on a *quantum meruit*, i.e., \$7,500, seems reasonable, and I should be better satisfied if the defendants would pay that sum. While

the plaintiff certainly magnified his office and took a position to which he was not rightfully entitled, his work seems to have been well done; and it would not be unfair to consider payment of a reasonable fee.

HODGINS, J.A., agreed with RIDDELL, J.

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FERGUSON, J.A.:—Counsel for the appellant urged that the learned trial Judge, having failed to appreciate that the contract sued upon in *Waterous Engine Works Co. v. Town of Palmerston*, 21 S.C.R. 556, was executory, erroneously interpreted that case as deciding that a by-law and contract under seal were essential conditions precedent to the validity of every municipal contract (Ontario), whether executed or executory, whereas that decision, rightly understood, must be limited to executory contracts. Counsel conceded that there are no decisions in the Supreme Court of Canada holding that a by-law and sealed document are not essential conditions precedent to recovery on an executed contract, but urged that it had been so decided in *Pim v. Municipal Council of Ontario*, 9 U.C.C.P. 304, followed in *Perry v. Corporation of Ottawa*, 23 U.C.R. 391, and in a number of other Ontario cases: that the *Pim* judgment, being an opinion of the Court of Error and Appeal, was binding upon the trial Judge, and upon this Court, and should be followed, even though that decision might appear to be in conflict with the provisions of the Municipal Act and the weight of judicial opinion in England, as shewn by the authorities referred to and quoted by the learned trial Judge. See the Interpretation Act, R.S.O. 1914, ch. 1, sec 27 (a); the Municipal Act, R.S.O. 1914, ch. 192, secs. 8, 10, 249; *Hunt v. Wimbledon Local Board* (1878), 4 C.P.D. 48; *Young v. Corporation of Leamington*, 8 App. Cas. 517; *Hoare v. Kingsbury Urban District Council*, [1912] 2 Ch. 452.

As I understand the provisions of the Judicature Act, R.S.O. 1914, ch. 56, this Court is bound by the decisions of the former Court of Error and Appeal; and, if the *Pim* case decided what counsel claims for it, and is not distinguishable or has not been overruled, we must follow it.

In *Silsby v. Village of Dunnville* (1883), 8 A.R. 524, 529, attention is called to a statement contained in the opinion of

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Hagarty, J., in the *Pim* case, where (9 U.C.C.P. at p. 311) he says:—

“The defendants” (the Provisional Municipal Council of the County of Ontario) “were incorporated for the express purpose of erecting a gaol and court house, and were declared ‘to have all corporate powers necessary for the purpose of carrying into effect the object of their erection under such provisional municipal council, and none other.’ Nothing is said in the statutes as to their having a corporate seal, or how they are to contract.”

A perusal of the opinions in the *Pim* case shews that the transactions there in question took place in 1852 and 1853, and therefore several years before the passing of the Municipal Institutions Act of 1858, 22 Vict. ch. 99; and, though the case is not reported until 1860, none of the learned Judges who took part in the judgment upon the appeal treated that case as being in any way governed or affected by sec. 186 of 22 Vict. ch. 99, which in its provisions is similar to, though not identical with, the sections of our present Municipal Act, R.S.O. 1914, ch. 192, sec. 249 (1) of which reads as follows:—

“Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law.”

The opinion in the *Pim* case appears to have been based upon an Act authorising, among other things, the creation of corporate bodies known as Provisional Municipal Councils, enacted in 1849, and being 12 Vict. ch. 78. Section 13 of that Act reads:—

“And be it enacted, that every such Provisional Municipal Council shall be a body corporate by the name of the Provisional Municipal Council of the County of \_\_\_\_\_, and as such, shall have all corporate powers necessary for the purpose of carrying into effect the object of their erection into such Provisional Municipal Council as herein provided, and none other.”

A perusal of the Act confirms the statement of Hagarty, J., “that nothing is said in the statutes as to their having a corporate seal, or how they are to contract,” from which it follows that only the common law requirement of a seal would be necessary to evidence corporate action.

Under these circumstances, it seems to me that the *Pim* case



must be classed with those cases in which there is said to be no express statutory provision requiring corporate action to be evidenced either by by-law or seal: *South of Ireland Colliery Co. v. Waddle* (1868), L.R. 3 C.P. 463; *Douglass v. Rhyl Urban District Council*, [1913] 2 Ch. 407; *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772.

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In the case at bar we are dealing with the effect of express statutory provisions; and, therefore, it seems to me the *Pim* case cannot be considered as deciding the question in issue, which is, do these statutory requirements bring the case at bar within the principles enunciated in *Hunt v. Wimbledon Local Board*, *Young v. Corporation of Leamington*, and *Hoare v. Kingsbury Urban District Council* (*supra*)?

As the contract in the *Waterous* case was declared to be executory, any statements in the reasons for judgment in reference to executed contracts should, I think, be treated as not necessary to the decision and as mere *obiter dicta*; but I do not think that we may, for that reason alone, disregard that judgment, or the opinions therein expressed.

The authorities are so well collected in the reasons of the trial Judge and in the judgments delivered in the Supreme Court of Canada in *Bernardin v. Municipality of North Dufferin*, 19 S.C.R. 581, and in the *Waterous* case, that it would be a waste of time and effort for me to attempt to review them. I will content myself with saying that, as I read these opinions and the citations therein, they establish that where there are no express statutory provisions requiring a seal or by-law the Court may and does dispense with the common law formality of a seal in respect to corporation contracts which have been fully executed, and are, in the opinion of the Court, within the power of the corporation to enter into as being for work or material necessary or proper for the conduct of the business for which the corporation was created; but that the Court cannot dispense with a seal or by-law, if such requirement is statutory, and such statutory requirement is, in the opinion of the Court, imperative, and not merely permissive or directory, that the proof of compliance with such a statutory provision is as essential in an action to enforce payment of the consideration for an executed contract as it is to the establishment or enforcement of an executory contract.



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All the learned Judges who wrote opinions in the *Waterous* case were of the opinion that the provisions of the Ontario Municipal Act requiring a by-law under seal were imperative; but Gwynne, J., was of the opinion that they only applied when the municipal corporation was exercising its legislative or statutory powers, and did not apply when the corporation was exercising its administrative or common law powers.

The learned authors of Meredith's Municipal Manual, 1917, at p. 15 of their work, express the opinion that the reasoning of Mr. Justice Gwynne in his dissenting opinion in the *Waterous* case is unanswerable; while I think the adoption of the view there expressed would render the Municipal Act more workable than the result at which I am arriving, yet it seems to me that the majority of the Court expressly rejected that view, and decided that these statutory requirements were essential prerequisites to the exercise by the municipal corporation of both its legislative and administrative powers; and, if that be the correct view of the opinion of the Supreme Court of Canada, we are, I take it, not concerned with whether the result is reasonable or unreasonable, wise or unwise. We should follow that interpretation till the opinion is overruled by a higher Court or the Act is amended by the Legislature. See the opinion of Lennox, J., in *Bradshaw v. Conlin* (1917), 40 O.L.R. 494, at p. 499, 39 D.L.R. 86, at p. 90.

In the *Bernardin* case, the statutory requirements of the Manitoba Act were held to be permissive or directory, while in the *Waterous* case the requirements of the Ontario statute were, in my view, held to be imperative; and that difference seems to me to determine, in favour of the respondents, the crucial point in the case at bar, and necessitates our affirming, on this question of law, the opinion of the learned trial Judge. See *Manning v. City of Winnipeg*, 21 Man. R. 203.

I am also of the opinion that the plaintiff has not made out a case of adoption or ratification by the city council sufficient to establish a contract to pay.

A perusal of the correspondence, whereby the scope of the plaintiff's retainer by the Mayor was enlarged, convinces me that the Mayor and the plaintiff had entirely different views as to the real nature and extent of the work and services which the plaintiff

would undertake and the remuneration he would seek or receive therefor, and that the Mayor did not appreciate the extent of the retainer which the plaintiff in this correspondence sought to obtain from him. That such is the case appears to justify what has been stated as the reason for enacting and maintaining as imperative even in executed contracts these statutory prerequisites to the contracts of certain corporate bodies. See the opinion of Lord Bramwell in *Young v. Corporation of Leamington*, 8 App. Cas. at p. 528, quoted by the learned trial Judge as follows:—

“The Legislature has made provisions for the protection of ratepayers, shareholders, and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into.”

It is also clear from the evidence of the Mayor that he intended that the services to be rendered by the plaintiff should be limited so as to bring the cost thereof to the defendants in the neighbourhood of \$5,000. It is equally clear that the plaintiff contemplated the earning of a much larger fee, and intended that his remuneration should be much more in case the defendants entered into the proposed purchase than it would be if the purchase was not completed. By assuming this attitude, the plaintiff, to my mind, placed himself in a position where his interest must necessarily conflict with his duty. It is not asserted that the plaintiff disclosed his intention to the city council, and it seems to me that, before the plaintiff can succeed or we can say that the city council was satisfied to and did receive, ratify, and adopt the plaintiff's work and report as the work and report of a trustworthy, competent, unbiassed adviser, it must be established that they had knowledge that the plaintiff did the work and prepared the report with the intention of making a larger claim in the event of the completion of the proposed purchase than he would make in case the council and the ratepayers of the municipality refused to exercise their option. I do not wish to be understood as saying that the plaintiff's opinion was necessarily or actually biassed by

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the views he admits he entertained as to the manner in which the amount of his remuneration should or would be fixed. It may not have been influenced in the least; but whether it was or was not must be, I think, a question on which the members of the city council have a right to exercise their judgment and form an opinion before we can say that they have ratified, adopted, or knowingly received and enjoyed the benefit of the plaintiff's labours and advice, so that we may presume, as against them and the city corporation, an agreement to pay.

It is not necessary for me to deal exhaustively with the sum mentioned by the learned trial Judge as a proper remuneration for the plaintiff's work in case he is found entitled to succeed. I am not impressed, however, with the view that the fee or remuneration of a competent, trustworthy, unbiassed expert as to whether or not a municipal corporation should enter into a transaction involving such a large amount of money as was involved in the proposed purchase of the properties and franchises of the Toronto Electric Light Company and the Toronto Railway Company, should be fixed by considering the amount of time he expended in preparing the opinion or in the length of the opinion prepared. Once it is established that the employers were satisfied that the adviser had the proper qualifications to advise and did advise in such a transaction, not as an advocate, but as an unbiassed expert, then the fee or remuneration allowed him should be on a liberal scale.

I would dismiss the appeal with costs.

*Appeal dismissed.*



## [APPELLATE DIVISION.]

1918

April 26.

## MURPHY V. CITY OF TORONTO.

*Workmen's Compensation Act—Contractor—Assessment—Jurisdiction of Board—Right to Resort to Court—4 Geo. V. ch. 25, sec. 60 (1).*

The judgment of Clute, J., 41 O.L.R. 156, was affirmed.

AN appeal by the plaintiff from the judgment of CLUTE, J., 41 O.L.R. 156.

April 24. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*Frank J. Hughes*, for the appellant, argued that the defendants had no right or duty to pay over the appellant's money to the Workmen's Compensation Board. No assessment had been made upon the appellant by the Board at the time of payment. The defendants were not entitled to take advantage of proceedings subsequent to payment. The defendants were not entitled to pay the appellant's money to the Workmen's Compensation Board until an order of the Board had been filed with the clerk of the County Court, and no such order existed at the time of payment. The Board, having formally delivered judgment subsequent to the first hearing by the trial Judge, could not now say that judgment was given at an earlier time. The Board had no quorum present for the October consideration of the appellant's assessment. All other considerations were subsequent to payment. The appellant was never in default after October, 1916, and the Board had thereafter no jurisdiction to assess him. The Board's auditor checked and passed the appellant's pay-roll before any assessment was made against him, and he was never thereafter in default. He referred to the provisions of the Workmen's Compensation Act, 4 Geo. V. ch. 25, and amending Acts.

*Irving S. Fairty*, for the defendants, respondents, contended that there had been a proper assessment; that the case came within the prohibition contained in sec. 60 of the Workmen's Compensation Act; and that exclusive jurisdiction was given to the Board.

*Hughes*, in reply.



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April 26. The judgment of the Court was delivered (orally) by MACLAREN, J.A.:—This is a matter arising out of the Workmen's Compensation Act. An appeal was brought by the plaintiff from a judgment that was rendered by Mr. Justice Clute (41 O.L.R. 156) dismissing the action.

It was strenuously argued before us that, notwithstanding the very large powers given to the Board in that Act, the plaintiff had still a right to press his claim in this Court. The jurisdiction of the Board is given in sec. 60 of the Act, sub-sec. (1) of which reads as follows:—

“60 (1).—The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any Court or be removable by *certiorari* or otherwise into any Court.”

It would be difficult to invent language more sweeping than this. Mr. Justice Clute was of opinion that the present case came within the prohibition of this section, and that exclusive jurisdiction was given in this matter to the Board.

We are of opinion that he was right, and the appeal is dismissed.

*Appeal dismissed with costs.*

[MIDDLETON, J.]

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April 27.

GORDON V. FRASER.

*Mortgage—Claim of Mortgagee to Fixtures in Store Erected on Land—Attornment Clause—Relation of Landlord and Tenant—Right to Remove Tenant's Fixtures—Mortgagor and Mortgagee—What is Included in "Fixtures"—Intention.*

The plaintiff was the mortgagee of land upon which was a store containing articles usually regarded as trade-fixtures. The mortgagor sold and conveyed the land to W.; he also sold his stock of merchandise, chattels, and fixtures to W., and executed a bill of sale thereof. W. made a bill of the same property to B., and B. to the defendant F. In this action the plaintiff sought to restrain the defendants from removing such of the articles as he considered to form part of the freehold. The plaintiff's mortgage contained a clause by which the mortgagor attorned to the mortgagee and became tenant of the land at a rent equivalent to and payable at the same time as the interest:—

*Held*, that by the mortgage all fixtures passed to the mortgagee, subject to the right to redeem; and, if the clause created the relationship of landlord and tenant, the fixtures were the landlord's and could not be removed by the tenant.

But the true relationship was that of mortgagee and mortgagor; and the mortgagor by the mortgage of the land pledged all that could be regarded as fixtures in the widest sense of the term—all things actually fixed, and such things not actually fixed as were intended to form part of the inheritance. *Monti v. Barnes*, [1901] 1 Q.B. 205, *Southport and West Lancashire Banking Co. v. Thompson* (1887), 37 Ch.D. 64, 70, *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335, and *Bing Kee v. Yick Chong* (1910), 43 S.C.R. 334, followed:

MOTION by the plaintiff for an interim injunction, turned by consent into a motion for judgment.

April 18. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

*Peter White*, K.C., for the plaintiff.

*J. H. Fraser*, for the defendants.

April 27. MIDDLETON, J.:—The plaintiff is mortgagee of certain lands and premises, and seeks to restrain the removal of certain articles which he contends are fixtures, and to compel the restoration of certain other articles which he asserts were also fixtures, or damages.

One Thornton owned the premises, and on the 1st December, 1912, mortgaged the same to the plaintiff to secure an advance of \$5,000.

Thornton sold the land to one Williams, and took from him a mortgage to secure part of the purchase-money. This mortgage is subject to the plaintiff's prior charge.

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Thornton and his brother, who carried on business in partnership, sold their stock of merchandise, fixtures, and chattels to Williams, and executed a bill of sale dated the 16th December, 1916.

On the 4th June, 1917, Williams made a bill of sale of the stock, chattels, and fixtures to one Black.

On the 11th October, 1917, Black made a bill of sale of the stock, chattels, and fixtures to Lillian Finkelstein.

The deferdant Isaac Finkelstein is her husband and acted for her; it was by error that he was made a party. Lillian Finkelstein consents to be added, and appears by the same counsel.

The fixtures in question are, so far as enumerated:—

- (1) A gasoline self-measuring outfit, tank underground.
- (2) A pump on the outside of the sidewalk attached by an underground pipe.
- (3) Two self-measuring oil-pumps.
- (4) A set of shelves and wall-fixtures for displaying goods, known as "Silent Salesmen."
- (5) A desk and other fixtures built in.
- (6) Counters—not attached but resting by their own weight.

The pumps have been removed, but it is not shewn by whom.

There was an earlier action by Thornton to restrain the removal of the fixtures, based upon the second mortgage, but that action failed. Thornton had made a bill of sale of these fixtures, and that would preclude him. Gordon was not a party to that action.

The mortgage in question here contains the ordinary clause by which the mortgagor is, until default, entitled to possession of the lands, and an additional provision by which the mortgagor attorns to the mortgagee and becomes tenant of the lands at a rent equivalent to and payable at the same time as the interest and which is to be accepted in satisfaction of the interest.

Subject to the question as to the articles being fixtures in fact, the argument for the defendants was based upon this clause.

Mr. Fraser contends that the effect of this clause is to create the relation of landlord and tenant between the parties, and the mortgagor can remove the fixtures as tenant's fixtures.

I do not think this is the situation. By the mortgage all fixtures passed to the mortgagee, subject to the right to redeem; and, if the clause creates the relationship of landlord and tenant,



the fixtures are the landlord's and cannot be removed by the tenant. As tenant, he was bound, on the expiry of the term, to surrender them to his lessor.

But the true relationship is that of mortgagee and mortgagor.

The law as to the right of a mortgagee to fixtures is now well settled. The mortgagor by the mortgage of the land pledges all that can be regarded as fixtures in the widest sense of the term—all things that are actually fixed, and such things as, though not actually fixed to the land, are intended to form part of the inheritance: *Monti v. Barnes*, [1901] 1 Q.B. 205.

The actual intention of the parties here is clear, for the mortgagor admits that the fixtures in question were pointed out as part of the security upon which the loan was made.

Adapting the language of Cotton, L.J., in *Southport and West Lancashire Banking Co. v. Thompson* (1887), 37 Ch.D. 64, at p. 70, it is impossible to suppose that this mortgage to secure this advance was intended to be made upon the store, and the mortgagor was to be at liberty to remove the fixtures, which alone rendered it of value as a store.

*Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335, brings the law down to that date. *Bing Kee v. Yick Chong* (1910), 43 S.C.R. 334, is in accordance with the views there expressed.

When a mortgage is made of leasehold lands—particularly when the mortgage is by sublease—difficult questions arise as to tenant's fixtures, but these cases do not, so far as I can see, aid in the solution of the matter in hand.

I think all the articles claimed must be declared to be fixtures and to be the property of the plaintiff as mortgagee, and that an injunction against removal must be granted. Unless the articles removed are replaced, there must be a reference to ascertain whether any of the defendants removed them, and their value.

The defendants, other than Isaac Finkelstein, but including Lillian Finkelstein, must pay the costs up to and including this judgment; as to Isaac Finkelstein, no costs.

Costs of the reference (if any) may be dealt with by the Master.

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[APPELLATE DIVISION.]

April 30.

## McLEOD v. McRAE.

*Limitation of Actions—Action for Recovery of Land—Defence under Limitations Act, secs. 5, 6(4)—Land in State of Nature—Acts of Possession—Cutting Timber—Pasturing Cattle—Fencing—Payment of Taxes—Relationship of Parties—Absent Nephew—Uncle in Loco Parentis—Bailliff.*

C. M. owned lot 9, which was divided by a road; the part south of the road was the homestead, with sufficient wood for family use; the part north of the road was in a state of nature, heavily wooded and unenclosed; the north part was ranged over by stock of C. M. and others; and this continued until his death in 1867. He devised the lot to his two sons—the part south of the road to the defendant and the north part to F. M.; the two sons resided together on the south part until F.M.'s death in 1872. During the period they used the place as their father had done, except that they chopped over about 18 acres near the river and sold the timber. The north part was never completely enclosed by fences. On the east side a fence was put up in 1899. Cattle were pastured in the bush on the north part in summer, but the land was never cultivated. F. M. devised the north part to the plaintiff, his nephew, who was born in 1854, and resided with his grandfather, and afterwards with the defendant, upon the south part, from early infancy until he left Canada in 1878. Before the plaintiff left, he cut wood upon the north part, and sold it; but he never lived upon or cultivated the land. Leaving in 1878, he did not return until 1917; in the interval he had remitted some money to the defendant for taxes. The defendant paid the taxes. The defendant continued during this period to cut timber upon the land and remove it and to use the land for pasture, but did not cultivate it. This action was brought in 1917, to recover possession of the north part; the defendant pleaded the Limitations Act:—*Held*, that, in order to acquire title under the statute (see R. S.O. 1914, ch. 75, secs. 5 and 6(4)), open, visible, exclusive, and continuous possession was necessary; and the acts of the defendant—payment of taxes, fencing, cutting and removing timber, and pasturing cattle—were not sufficient to shew such a possession as was requisite.

*Held*, also (MULOCK, C.J.Ex., expressing no opinion, and FERGUSON, J.A., dissenting), that the defendant, having, according to his own evidence, continued the use of the land after the plaintiff left in the same way as before, when he stood in *loco parentis* to the plaintiff, was bailiff thereof for the plaintiff, and his possession was not adverse, at least until 1908, when he conveyed away part of the land.

Review of the authorities.

APPEAL by the plaintiff from the judgment (dated the 23rd January, 1918) of LENNOX, J., who tried the action without a jury at Ottawa, dismissing it without costs.

The action was brought to recover possession of a part of lot 9 in the 1st concession of the township of Cumberland, namely, that part lying north of the highway and bounded by the Ottawa river.

The defendant admitted the plaintiff's paper-title, and set up the Limitations Act, R.S.O. 1914, ch. 75.

March 6 and 7. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ., and FERGUSON, J.A.

*C. J. Holman*, K.C., for the appellant, argued that the evidence shewed that the land had remained in a state of nature to the present time. The case therefore came within the Limitations Act, sec. 6 (4), and it was clear that the defendant had not had the 20 years' possession necessary in order to bar the plaintiff's claim. Even if the period of limitation should be considered as restricted to 10 years, the acts relied upon to prove the defendant's possessory title were insufficient for that purpose. All that he had was a kind of permissive possession, and the acts of ownership and care of the premises by the defendant might be referred to his desire to preserve the property for the benefit of the plaintiff, to whom he stood somewhat in the position of a guardian. Reference was made to *Wood on Limitations*, 4th ed., vol. 2, p. 1243.

*G. F. Henderson*, K.C., for the defendant, the respondent, argued that while it might be contended that no single act, looked at by itself, was sufficient to prove possession, the effect of the evidence, taken as a whole, clearly supported the finding of the learned trial Judge. The land in question had been used as a part of the defendant's farm continuously since 1878, and his position with reference to the plaintiff was that of a tenant at will, and under the statute time began to run in his favour one year after the plaintiff left the country in 1878. Reference was made to *Wood*, *op. cit.*, p. 1239; 17 Cyc. 535; *Johnson v. Kraemer* (1884), 8 O.R. 193; *McCowan v. Armstrong* (1902), 3 O.L.R. 100.

*Holman*, in reply, referred to *Morgan v. Morgan* (1737), 1 Atk. 489, which was considered in *Wall v. Stanwick* (1887), 34 Ch. D. 763, 765, and in *Howard v. Earl of Shrewsbury* (1874), L.R. 17 Eq. 378, 399. [RIDDELL, J., referred to *Davis v. Henderson* (1869), 29 U.C.R. 344.] That case is considered in *Shepherdson v. McCullough* (1882), 46 U.C.R. 573, 602, *per* Armour, J., whose judgment was cited with approval in *Harris v. Mudie* (1882), 7 A.R. 414. He referred also to *Stovel v. Gregory* (1894), 21 A.R. 137; *Campeau v. May* (1911), 2 O.W.N. 1420; *McIntyre v. Thompson* (1901), 1 O.L.R. 163; *Re Hewitt* (1912), 3 O.W.N. 902, 3 D.L.R. 156.

April 30. CLUTE, J.:—The action is brought for possession of all that part of lot No. 9 in the 1st concession of the township of Cumberland, in the county of Russell, lying north of the highway and bounded by the Ottawa river.

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The defendant admits the plaintiff's title, but says that the plaintiff's claim is barred by the Limitations Act, R.S.O. 1914, ch. 75.

It is important to refer to the facts and the circumstances under which the plaintiff received title and to the defendant's claim to possession.

Colin McRae, the father of the defendant, and grandfather of the plaintiff, owned the whole of lot No. 9, and lived upon and cultivated that portion thereof lying south of the highway.

The defendant resided with his father, Colin McRae, until 1867, when the father died, having devised the portion south of the highway to the defendant, and the portion north, between the highway and the river, to his son Farquhar McRae, who was unmarried, and who, until his death in 1872, resided with his brother, the defendant. The plaintiff, who is a nephew of the defendant, resided with his grandfather, and afterwards with the defendant, from early infancy until he left Canada in 1878. At the time of the father's death, the portion of the lot bequeathed to Farquhar, herein called "the north portion," was unenclosed and in a state of nature, being heavily wooded from the highway to the river and separated from the homestead by the highway. After the grandfather's death, and while the plaintiff was still residing with the defendant, certain timber and wood were cut and sold off the lot, from about 15 to 18 acres, during Farquhar's lifetime; but no portion of the land north of the road was ever cultivated. About 14 years ago the defendant partly chopped over 7 or 8 acres adjacent to the road, which was not cleared, and is now grown up to second growth; so that, according to the surveyor who made a thorough examination from one end to the other of the part lying north of the Montreal road, there were approximately  $1\frac{1}{2}$  acres partly cleared lying between the road and the Canadian Northern Railway, and about 8 acres (above mentioned) partly chopped north of the railway, with no cultivation, and the rest is described as heavily timbered.

Farquhar McRae made his will, dated the 4th April, 1872, whereby he devised to the plaintiff the north portion, subject to the payment of five legacies of \$20 each, charged upon the land, "payable when the plaintiff arrives at the age of 25 years which will be in the year of our Lord 1879," and appointed by his said will the defendant as one of his executors.



The plaintiff, while residing with the defendant, worked upon the farm in the usual way of a farmer's son, from the time he was 14 years of age until he was 24 years old, with the exception of a few months when he returned to his father's home on the occasion of the death of his brother, and while he worked for 7 months and 2 months for neighbours, when he returned to the defendant; on each occasion he lived with him as before, until he left Canada in 1878. Before the plaintiff left, he cut a little wood, perhaps some 10 or 15 cords, upon the north portion, sold it and received the money. He never lived upon the land nor was it cultivated. At the time he left he had not received from the defendant the \$80 willed to him by his grandfather. The defendant now contends that the plaintiff has forfeited this sum by not continuing to reside upon the farm; the fact being that he went home for two or three months on the occasion of his brother's death, but returned again to the defendant and lived there as formerly. The plaintiff alleges that after he left Canada he sent certain sums of money for taxes; on one occasion \$25 and on others \$100 and \$50. The defendant admits that he received the \$25 but no more. The plaintiff says he continued to send money to the defendant to pay taxes until the defendant wrote him not to send any more until the defendant had paid out what he owed to the plaintiff. The defendant denies this.

The evidence was directed largely to prove that the 18 acres near the river were chopped over and cleared for pasture. This I regard as immaterial on the question of possession, as that clearing was in fact done during Farquhar's lifetime.

The case that the defendant sets up is, that the grandfather (owning the whole lot) had used the portion north of the road for pasture, and that the defendant continued to do the same, and by clearing near the river extended the area of pasturage, and so continued to use the lot in connection with the portion south of the road as part of the farm from the time the plaintiff left Canada until his return in 1917, and that he (the defendant) subsequently enclosed it by a fence; and he asserts that he treated the property as his own and had such exclusive possession as to give him a title by possession under the statute.

The trial Judge refers to Mr. Edward Rainboth, surveyor, as "a gentleman of experience and undoubted reputation and no doubt an honest man," but thinks he is mistaken as to the quantity

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of cutting done on the lot; the learned Judge says that he is satisfied that there was a large clearing along the river for the purpose of getting the wood off and for the purpose of improving the pasture, and as to the land lying along the railway there was also clearing; he also finds that there was a general cutting through the whole body of the bush, and that the land was fenced with the object and practically with the effect of obtaining exclusive possession; that acts of ownership were exercised upon it quite extensively by the defendant. He says: "I am very decidedly influenced by the evidence of Mr. Hayes . . . and also by the evidence of Mr. Norman Wilson."

After a careful perusal of the evidence, and giving full weight to the witnesses referred to by the learned trial Judge, I am unable to reach the conclusion arrived at by him. This is not a case where acts of ownership may be relied upon to give a title by possession, as where colour of title goes with possession. In the case of a man receiving, in a *bonâ fide* transaction, the conveyance of land by metes and bounds, the acts of ownership upon the land have relation to the whole, and may support a claim by possession under a defective title, where the same acts of ownership without colour of title would afford very slight, if any, evidence of possession. What in the one case may well be regarded as evidence of acts of ownership and possession of the whole would in the other be simply isolated acts of trespass.

In the present case, the defendant has no colour of title; it is a case where he must shew "open, obvious, exclusive, and continuous possession," to make title against the true owner.

The evidence upon the main facts is not, to my mind, contradictory, when read in the light of the surrounding circumstances, and shews, in my opinion, no such possession as is required to oust the plaintiff. No reference is made by the learned trial Judge to the credibility of the plaintiff or the defendant, or which he believed, if either, as against the other. The story of the plaintiff seems to me more credible than that of the defendant, whose evidence is to my mind unsatisfactory. The learned trial Judge informs me that he was satisfied with the honesty of the plaintiff's evidence. After careful reading of both, I accept that of the plaintiff as the more probable where they differ.

I have collected the evidence bearing upon the question of

possession in the appendix hereto, which may be summarised as follows:—

Colin McRae owned lot 9, which was divided by the "Montreal road," the part south of the road being the homestead, with sufficient wood for family use. The part north of the road was in a state of nature, and heavily wooded and unenclosed. The part north of the road, with other lots adjoining, was ranged over by stock of Colin McRae and other neighbours, and this continued until his death in 1867.

Colin McRae having willed the lot to his two sons—the part south of the road to the defendant and the part north of the road to Farquhar—they continued to reside together until Farquhar's death in 1872. During this period they continued to use the place as their father had done, except that they chopped over about 18 acres near the river and sold the timber. This land next the river was flooded until July or August in each year, and from flooding and chopping there was a small amount of pasture after the waters subsided. This chopping was nearly 50 years ago; and, when the surveyor examined the lot to give evidence at the trial, he found it so grown up that he did not recognise it as having been chopped over. Except the 7 or 8 acres near the road, which were chopped over about 13 years ago, and grown up with second growth, the part north of the road remains what is described as a beautiful and heavily timbered wood, one of the best in that section of the country. The defendant admits this and claims to have protected the wood. It is said that some seed was scattered where the chopping had been done, but there is no pretence that it was cultivated. Nothing has been done since. It is now grown up to second growth.

The fencing was partial—inadequate and incomplete. There never has been a fence along the river on the north side, although the lots to the west and east were so fenced. There was no fence on the east side until about a year after McNeilly and Shirkey bought the adjoining lot in 1898, when McNeilly built the fence between lots 8 and 9. The witness Shirkey was a partner of McNeilly in the purchase of the 100 acres east of the lot in question, and they fenced their lot, and he expressly states that "Mr. McNeilly put the fence up." They also fenced their lot on the river-front.

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On the west, about the same time, the owners of the adjoining lot fenced it, as Wilson says, to keep their cattle in. The defendant claims that he was to keep up part of the side-line fences, but it does not appear what, if anything, he did in that regard. This lot has never been fenced along the river.

The defendant's sons in 1903 extended the side-line fence into the river at low water, but it was carried away by high water the next year. It was said that it was useless to fence along the river on account of high water each year, which would carry the fences away.

Some other farms were not so fenced, but others were—e.g., the Wilson and McNeilly farms. Duncan McRae, the defendant, said at first that the fences were put up in 1900—when McNeilly bought the farm. Later he said: "I did not give my statement correctly. I don't think the fence was there then; within the next two or three years they fenced their part."

Except for the short period of low water, in July and August, when part of the herd were turned below the road, the land in question was quite vacant in each year. Occasionally wood and timber from fallen trees were taken off. During the grand father's lifetime, and afterwards in the same way, part of the herd was turned out in the "bush," and ran there after low water in July and August, with other cattle belonging to different neighbours.

Shirkey, the adjoining owner, says: "They put them down across the Montreal road; his cattle would get out of there and ours would get out sometimes, and we used to find the cattle of five or six neighbours all together;" "most of the grass is to east." It is uncertain just when the fence was put along the road.

The evidence of Hayes and Wilson, referred to by the trial Judge as trustworthy, falls far short of making out a case of possession by the defendant.

Hayes lived  $2\frac{1}{2}$  miles by road from this farm; was unacquainted with the defendant's father or Farquhar. He had seen cattle pasturing there, and had drawn wood off the lot for Duncan McRae.

"Q. How is it for summer pasture? A. When the high water goes down; sometimes it is July and sometimes August.

"Q. Is that the proper term? Summer pasture? A. Yes, it is used amongst the neighbours. It has been fenced along the road for 14 years.



"Q. On the sides? A. I would not give it a name. I don't know. The wire is in the trees now, it has grown into the trees. It has been there quite a while."

His evidence is very indefinite and inconclusive.

Norman Wilson, the other witness referred to by the trial Judge, is equally uncertain. He says he drew cordwood to the village in 1911 for Duncan McRae. The property to the west of this land was purchased somewhere in the nineties—1893 or 1894; saw McRae cutting wood, and has seen cattle he understood were McRae's pasturing there. When the property was first purchased there was a fence to be maintained in different proportions by the adjoining owners. At the time it was Colin McRae and McCallum. "We were given this same agreement." "We followed it out as near as we possibly could." He could not swear the cattle were the defendant's. One year he kept a good many steers; they broke out; McRae complained, "so we fixed the fence to keep our steers out."

Under the authorities; to which I shall now refer, I think this evidence falls very far short of shewing such possession as will defeat the admitted paper-title.

Section 5 of the Limitations Act, R.S.O. 1914, ch. 75, limits the time to bring an action to recover land to 10 years next after the time within which the right to bring such action first accrued.

Section 6, sub-sec. (4), declares that 10 years shall not be a bar, but no action shall be brought after 20 years, when the land is in a state of nature.

In *McConaghy v. Denmark* (1880), 4 S.C.R. 609, at p. 632, Gwynne, J., says that, by a long unbroken chain of decisions extending over a period of upwards of 40 years, it has been held by the Courts in Upper Canada that the possession which will be necessary to bar the title of the true owner must be an actual, constant, visible occupation; and (p. 633) that payment of taxes, or the committing of acts of trespass, by cutting timber from time to time, by a person not in actual, visible possession, will avail nothing towards establishing the possession which the statute requires.

The authorities for these propositions are to be found in a long list of cases cited by Gwynne, J., at p. 633. Ritchie, C.J., Strong, Fournier, and Taschereau, JJ., concurred.

*Sherren v. Pearson* (1887), 14 S.C.R. 581, was an appeal from

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a judgment of the Supreme Court of Prince Edward Island. It was there held (head-note, p. 581), that "isolated acts of trespass, committed on wild lands from year to year, will not give the trespasser a title under the Statute of Limitations, and there was no misdirection in the Judge at the trial of an action for trespass on such land refusing to leave to the jury for their consideration such isolated acts of trespass as evidencing possession under the statute. To acquire such title there must be open, visible, and continuous possession, known or which might have been known to the owner, not a possession equivocal, occasional, or for a special or temporary purpose." The principal judgment was given by Ritchie, C.J., concurred in by Strong, J., and Fournier, J.; Henry and Tascherneau, JJ., gave written opinions agreeing also with the Chief Justice.

*Doe d. Des Barres v. White* (1842), 1 Kerr (3 N.B.) 595, is (14 S.C.R. at p. 586) referred to and quoted by Ritchie, C.J., with approval, wherein it was said that the presumption is that the owner remains in possession of that which is not actually in possession of others until proof be given of acts of possession by the defendant. It is sufficient for the plaintiff, as owner of the fee, to shew that the land continued in its natural state, and unenclosed, within 20 years before action. Ritchie, C.J. (14 S.C.R. at pp. 587, 588), quotes from that case some observations which are applicable to the present, where Parker, J., afterwards Chief Justice, says:—

"It is impossible not to perceive the different manner in which the rights of an owner of wilderness land are affected by a person entering, enclosing, and actually cultivating, who stands there in fact openly and notoriously excluding the owner from the possession, and against whom, as it was ably argued, he may immediately proceed to a legal adjudication of his title; and by another who enters, cuts down the trees here and there, taking them off the land for the purpose of using them, and often without the knowledge at the time of the owner, who may indeed remain in ignorance of the person by whom these acts are committed, and who cannot well be prepared to meet evidence of such acts, when they are brought forward as proofs of an adverse possession. If every intendment is to be made in favour of the lawful owner, in order to protect right and suppress wrong, why should the act of cutting

down a tree, and taking it away, be intended as an act of possession of the land? The intent to occupy the land is not indicated by that act; in general, no such intent accompanies it. It is the commission of a wrong, not the exercise of a right; and on what principle would you extend benefit to the wrong-doer, beyond the necessary consequence of the act? He may continue such acts for years, and yet never think of possessing himself of the land."

In the same case, Ritchie, C.J. (14 S.C.R. at pp. 588, 589), quotes Carter, J., afterwards Chief Justice, as follows:—

"Now in the absence of any other evidence, what inference is to be drawn from the mere fact of a person going on the land of another, and cutting down a few trees, and carrying them away for firewood? Surely not that he intends to take possession of the land on which the trees grew, but that he intends merely to get the wood for his own purposes. Suppose he does this repeatedly, and that he ultimately cuts down all the trees, when is it that he can be said to manifest an intention to take possession of the land itself? Granting however that repeated acts of trespass of such a nature on land may constitute a possession of the land, still it is obvious that such possession cannot be said to commence until after the last act of trespass has been committed, which will make up the amount necessary to constitute such possession. In the case of land under cultivation, suppose a person who has no title takes possession by fencing; that he begins by erecting a small part of the fence, and does not completely fence the whole in until some years have passed; his possession of the whole could hardly be said to commence until the whole of this fence was completed."

Ritchie, C.J. (14 S.C.R. at p. 589), after quoting from the *Des Barres* case, says: "I have cited this case at greater length than I otherwise should have done, because it has ever since been regarded and acted on as enunciating the correct principles in reference to the possession of wilderness lands."

In the Court below in the *Des Barres* case the trial Judge refused even to leave occasional acts of ownership exercised by the defendant to the jury as evidence of possession under the Statute of Limitations. Strong, J., referring to this, says (14 S.C.R. at p. 591): "As I am clearly of opinion, for the reasons already stated by the Chief Justice and which I need not therefore repeat, that these trespasses were no evidence of possession, there is, in my opinion, no alternative but to dismiss the appeal."

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The expression "state of nature" in sub-sec. (4) is used in contradistinction to the preceding expression "residing upon or cultivating;" and, unless the patentee of wild land, or some one claiming under him, has resided upon the land or has cultivated it or improved it or actually used it, the 20 years' limitation applies.

Clearing or cultivating by successive trespassers will not avail to shorten this limit: *Stovel v. Gregory*, 21 A.R. 137; and, *per* Burton and MacLennan, J.J.A.: "Merely fencing in a lot without putting it to some actual, continuous use is not sufficient to make the statute run." Osler, J.A., gives no opinion on the question of fencing. Hagarty, C.J.O., was clearly of the opinion that the true construction of sub-sec. (4) of sec. 5 is to provide a limitation of 20 years, unless the grantee, or some one claiming under him, has actually resided upon the land in question or has cultivated it or improved it in some other way; and he did not think that the cutting of timber by trespassers could affect the rights given by this section, but the point as to fencing was more doubtful. He says: "I do not wish to give a definite opinion upon that point, though, as at present advised, I am against the defendant on that point also." Burton, J.A., says that the expression "state of nature" is used in contradistinction to "residing upon or cultivating." He was also of the opinion that to acquire title by possession it is not sufficient merely to fence the land; some actual use and occupation of the fenced-in portion must be shewn in addition; and isolated trespasses are not sufficient to cut out the title of the true owner.

The lands in question are separated from the south portion of the lot by what is called the Montreal road, and the evidence clearly establishes that during the lifetime of the patentee this portion north of the road was preserved in a state of nature. The southerly 125 acres was the portion of lot 9 partly cleared and occupied by the grandfather. His devisee, Farquhar McRae, never took possession by residing upon or by cultivating any portion thereof, as required by sub-sec. (4) of sec. 5; neither did the plaintiff before he left Canada; and, unless the occupation by the grandfather of the portion south of the road can be regarded as an occupation also of the portion north of the road, then it is clear the lands fall within sub-sec. (4); and in that case, from the evidence, it is quite clear that there was no such possession by the



defendant for over 20 years as would make out a title by possession and deprive the plaintiff of his land.

It appears from the abstract of title furnished by counsel on both sides that Colin McRae, the plaintiff's grandfather, received his deed of bargain and sale on the 21st March, 1843, as one parcel, and having settled upon a portion of this lot and occupied the whole as a farm, it is clear, in my opinion, that the 20 years' limit has no application to this case.

Assuming that the facts do not bring the case within sub-sec. (4) of sec. 5, the question remains: Has the defendant made out a title by 10 years' possession? The acts of ownership and care of the property, said to have been done and exercised by the defendant, are more consistent, regarding him as an honest man, and having regard to his relationship and position *in loco parentis* towards the plaintiff, with his intention to take charge and care of the premises for the plaintiff than to acquire title to the property; the plaintiff, having been brought up from infancy in the defendant's house, had worked for him without wages from the time he was 14 years of age until he was 24 years old; and, when the plaintiff returned after his long absence, and spoke to the defendant as to the land, he seemed at first to recognise the plaintiff's right, and the only ground he could suggest for saying that the land in question was his (the defendant's) was, that he had paid the taxes and that there was a small balance due him over and above the amount sent by the plaintiff.

None of the alleged acts of ownership, nor all of them together, are, in my opinion, sufficient.

The fencing was partial only, and not done with the object of taking possession, but to protect the pasture for a few months in summer, and it was not effective for that. For the rest of the year the lands were wholly vacant, except for occasional acts of trespass in taking some wood and timber.

In *Reynolds v. Trivett* (1904), 7 O.L.R. 623, it is said that "the building of the fence was of no significance as an act of ownership." It was also further held that cutting and removing wood and pasturing cattle, being intermittent and isolated acts, were merely acts of trespass, and insufficient to constitute possession of the kind required by the statute to bar the true owner.

In *Re Hewitt*, 3 O.W.N. 902, 3 D.L.R. 156, Middleton, J., did

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not give effect to the fact that the land had been fenced for 30 years, and that the claimant had for 20 years off and on stored lumber and other stuff thereon; even when supplemented by a further statement that some material remained there continuously. There must, he said, be "actual, constant, and visible occupation," although he held in *Campeau v. May*, 2 O.W.N. 1420, that the statutory period was 10 years and that the land had been enclosed for that length of time.

In *Coffin v. North American Land Co.* (1891), 21 O.R. 80, it was held that the mere fact that the plaintiff paid the taxes was not sufficient to keep the right of the owners alive against him. The acts done in the winter did not constitute an occupation of the property to the exclusion of the rights of the true owners, but were mere acts of trespass, covering necessarily but a very short portion of the winter, and, as the possession must be taken to have been vacant for the remainder of it, the right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken again in the spring by the plaintiff: *per* Street, J.

It is clear that isolated acts of trespass by one man will not bar the true owner: *Allison v. Rednor* (1857), 14 U.C.R. 459; see *Armour on Titles*, 3rd ed., p. 303 *et seq.*, and cases there cited, on the question of successive trespassers.

The cases first above quoted are as applicable to a 10 years' possession as to a 20 years' possession, where, as here, the defendant's claim is without colour of legal title.

In *Harris v. Mudie*, 7 A.R. 414, it was held, that "the doctrine of constructive possession has no application in the case of a mere trespasser having no colour of title, and he acquires title under the Statute of Limitations only to such land as he has had actual and visible possession of, by fencing or cultivating, for the requisite period."

Burton, J.A., points out, at p. 421, that the rule "has always been to construe the Statutes of Limitations in the very strictest manner where it is shewn that the person invoking their aid is a mere trespasser, having no colour of title, and such a construction commends itself to one's sense of right. They were never in fact intended as a means of acquiring title, or as an encouragement to

dishonest people to enter on the land of others with a view to deprive them of it. See the remarks of the late very learned Chief Justice Robinson in *Doe dem. Shepherd v. Bayley* (1853), 10 U.C.R. 310, 318; and *Doe Beckett v. Nightingale* (1849), 5 U.C.R. 518. See also the observations of Kindersley, V.-C., in *Edmunds v. Waugh* (1866), L.R. 1 Eq. 418, 421."

The learned Judge (Burton, J.A., in 7 A.R. at p. 425) comments adversely on the case of *Davis v. Henderson* (1869), 29 U.C.R. 344; and, while he does not quarrel with the decision, he takes exception to the generality of the language of one of the Judges. He also refers (p. 427) to *Mulholland v. Conklin* (1872), 22 U.C.C.P. 372, 376, where the language is broad enough to include the case of a mere trespasser. That was a case, however, in which the claimant was not a mere trespasser, but entered under an agreement to purchase.

At p. 427, Burton, J.A., says: "There ought, I think, to be no difficulty in confining a mere trespasser to the portions from which he excludes the true owner by his actual residence or occupation;" and at the close of his judgment (p. 430) he expresses his approval of the able and exhaustive judgment of Mr. Justice Armour in the case of *Shepherdson v. McCullough*, 46 U.C.R. 573, and concurs in the opinion therein expressed "that the possession of a wrong-doer is not to be extended by any implication or constructive possession beyond the limits of his actual occupation," and refers to *Clark v. Elphinstone* (1880), 6 App. Cas. 164.

In *Wood v. LeBlanc* (1904), 34 S.C.R. 627, the distinction is again pointed out between land claimed under colour of title and land claimed under a succession of trespasses. In the former case possession of part of the land under colour of title is constructive possession of the whole, which may ripen into an indefeasible title, if open, exclusive, and continuous for the whole statutory period. Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other parties lumbered on the land continuously or at intervals, during any portion of such period.

Davies, J. (at p. 634), refers to *Sherren v. Pearson*, *supra*, and says that in that case Chief Justice Ritchie formally approved of the law as laid down in *Doe d. Des Barres v. White*, *supra*, and went on

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to say: "To enable the (trespasser) to recover he must shew an actual possession, an occupation exclusive, continuous, open or visible, and notorious for 20 years. It must not be equivocal, occasional, or for a special or temporary purpose." And in another place he says: "The trespasser to gain title must, as it were, 'keep his flag flying over the land he claims.'"

Davies, J., after referring to the judgment of Henry, J., in *Sherren v. Pearson*, says (34 S.C.R. at p. 635):—

"Now, in my judgment, the possession necessary under a colourable title to *oust* the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed *but only when and while there is that part occupation.*"

Killam, J., after a review of the cases, expressed his opinion at p. 647:—

"That the person relying upon this doctrine must enter under a real, *bonâ fide*, belief of title; that, while in many cases it may be proper to assume this belief, yet circumstances may often warrant a jury, without direct evidence of want of such belief, in finding that the party knew or strongly suspected that he had acquired no real title; and that, in such cases, a jury is warranted in treating the party as in no better position than a mere trespasser, acquiring no possession of any land which he does not take into his actual and effective occupation."

The *Coffin* case was distinguished in *Piper v. Stevenson* (1913), 28 O.L.R. 379, 385. In that case there was an actual, continuous occupation in one enclosure, including the land in question.

Applying these authorities to the present case, I am satisfied there has been no such open, exclusive, and continuous possession for 10 years as to give the defendant a right to this land as against the plaintiff.

Mr. Holman also invoked the doctrine applicable to a bailiff or guardian in possession of property, and referred to *Morgan v. Morgan*, 1 Atk. 489; *Howard v. Earl of Shrewsbury*, L.R. 17 Eq. 378, at pp. 397-401; *Wall v. Stanwick*, 34 Ch. D. 763.

In *Morgan v. Morgan*, 1 Atk. at p. 489, the Lord Chancellor (Hardwicke) lays it down that: "Where any person, whether a



father or a stranger, enters upon the estate of an infant, and continues the possession, this Court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined."

This principle was considered and applied in *Howard v. Earl of Shrewsbury*, L.R. 17 Eq. at p. 398, by Sir George Jessel, M.R. He refers to the decision of Lord Romilly in *Crowther v. Crowther* (1857), 23 Beav. 305, 309, where he says: "This Court will not allow an infant to be turned out of possession of an estate without legal process, and accordingly the cases cited are all instances of persons intruding on an infant in possession, either by himself or his guardian or bailiff; but if it is admitted that the infant never was in possession or in the enjoyment of the property, either by himself or his guardian, he stands in the same situation as any other person, and must first establish his legal title."

The Master of the Rolls declares that "that is not a correct statement of the law," and, after referring to *Morgan v. Morgan*, above quoted, and other cases, says (p. 401): "The result therefore is, adopting the language of Lord Hardwicke, that an infant is entitled to treat a stranger who takes possession of his estate as his 'bailiff' or agent, to get, if he likes, from him an account of the rents and profits, and a decree for possession."

The question is further considered in *Wall v. Stanwick*, 34 Ch. D. 763, where it was held, that after her second marriage the mother was in possession as bailiff for her infant children, and not as guardian by nurture, or by leave of her children, or as a trespasser, and was therefore a trustee and liable to account. Kekewich, J., after referring to *Howard v. Earl of Shrewsbury* and other cases says (p. 767): "Such a bailiff occupies a fiduciary position, so that he may properly be styled a trustee, as a testamentary guardian may be (see *Mathew v. Brise* (1851), 14 Beav. 341, where the Statute of Limitations was held inapplicable on this ground)." Kekewich, J., further says (p. 768): "In *Thomas v. Thomas* (1855), 2 K. & J. 79, . . . Vice-Chancellor Wood distinctly held that where a man had entered as guardian (meaning bailiff), the Court would never allow him to set up any other title to the estate."

See also *Blomfield v. Eyre* (1845), 8 Beav. 250, where it was held: "An infant is entitled to treat a person who enters on his estate during his infancy as his bailiff, who is accountable as such,"

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and "The jurisdiction which this Court has, to decree accounts of the estates of infants, against persons entering thereon during their minority, is not taken away by the fact, that at the time when the bill was filed the infant had attained 21."

In *Mathew v. Brise*, 14 Beav. 341, it was held: "A testamentary guardian is a trustee, and therefore the Statute of Limitations is inapplicable to accounts as between him and his ward." And Sir John Romilly, M.R., at p. 345, said, "that of all the property which he gets into his possession in the character of guardian, he is trustee for the benefit of the infant ward."

In *Hickey v. Stover* (1885), 11 O.R. 106, it was held, "that J. L. having been appointed by the Surrogate Court guardian of her son, T.L., she thereby became an express trustee during his minority, so that she could not acquire title against him by possession of his lands, yet that the guardianship ended and the trust ceased with T. L.'s minority, and as after that J.L. dealt with the land in question as her own for some 22 years, she had acquired a good title to it by possession as against T. L."

*Hickey v. Stover* was followed in *Clarke v. Macdonell* (1891), 20 O.R. 564. In that case, Mary Kelly, the mother, was appointed guardian of her son David Kelly, to whom the lands had been devised. It was contended that the Statute of Limitations began to run against David Kelly immediately upon his attaining his majority. Armour, C.J., said (p. 568): "But I do not think so. He was, and continued to be, in possession of the lands in question until his death, for his guardian's possession was his possession, and his guardian was no more than a caretaker for him, and although her authority as guardian ceased when he attained his majority, yet, as she was in possession as his guardian at the time he attained his majority, she must be taken to have continued in possession in the same character unless something was done to change the character of her possession; and no such change was proved; and her possession continued to be his possession as it was before he attained his majority." He referred to *In re Taylor* (1881), 28 Gr. 640, as distinguishable, for there it was a stranger. The judgment of Armour, C.J., was, however, reversed by a Divisional Court: see pp. 570 to 573.

In *Kent v. Kent* (1891), 20 O.R. 445, referring to cases cited,

including *Wall v. Stanwick*, *supra*, *Thomas v. Thomas*, *supra*, *In re Hobbs* (1887), 36 Ch. D. 553, and *Lyell v. Kennedy* (1889), 14 App. Cas. 437, Armour, C.J., and Street, J., sitting as a Divisional Court, declined to follow *Hickey v. Stover* and *Clarke v. Macdonell*, and reversed upon this point the judgment of Boyd, C., in *Kent v. Kent* (1890), 20 O.R. 158.

Armour, C.J., said (20 O.R. at p. 463) that the cases to which he referred "establish the principle that if a person as bailiff, servant, agent, attorney, caretaker, guardian (whether natural or statutory) or in any other fiduciary character, enters into the possession of lands, or into the receipt of the rents and profits thereof, for and on behalf of the owner, the possession or receipt of such person is the possession and receipt of the owner and of those claiming under him; and the possession and receipt of such person, so long as he continues in such possession or receipt, is to be ascribed to the character under which he entered into such possession or receipt, and he cannot denude or divest himself of such character except by going out of such possession or receipt and delivering up such possession or receipt to the owner or to those claiming under him. There are two cases, however, opposed to the principle so laid down: *Hickey v. Stover*, 11 O.R. 106, a decision of the Chancery Divisional Court; and *Clarke v. Macdonell*, a decision of the Common Pleas Divisional Court. The former case was decided before the decisions in *Wall v. Stanwick*, *In re Hobbs*, and *Lyell v. Kennedy*, and the latter after them. These cases were wrongly decided if the cases to which I have referred were rightly decided, and I am of opinion that they were."

This decision was affirmed by the Court of Appeal: *Kent v. Kent* (1892), 19 A.R. 352. Osler, J.A., said (p. 360): "Upon the other point argued, viz., the effect of the Statute of Limitations, I have nothing to add to what has been said in the Court below. The authorities referred to appear to me fully to support the conclusion that the Statute of Limitations forms no bar to the action." Maclellan, J.A. (p. 371), also agreed with the Judges of the Divisional Court on the question of the Statute of Limitations. Hagarty, C.J.O., concurred. Burton, J.A., dissenting, expressed no opinion upon this question.

In *Fry and Moore v. Speare* (1915), 34 O.L.R. 632, 26 D.L.R. 796, affirmed (1916) 36 O.L.R. 301, 30 D.L.R. 723, it was held by

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Meredith, C.J.C.P., that there is no irrebuttable presumption that the parent in possession holds as "bailiff" in respect to the share of the child out of possession. The question is one of fact, though ordinarily the finding should be that the possession of the parent is that of the child.

Sir William Meredith, C.J.O., in appeal (36 O.L.R. at pp. 304, 305, 30 D.L.R. at p. 726), accepts as a correct statement of the law the observation of Sir Samuel Walker, C., in *In re Maguire and McClelland's Contract*, [1907] 1 I.R. 393, that the cases shew that the relationship of principal and agent will be dissolved by circumstances; the attaining of twenty-one years of age by the children is not enough in itself to dissolve the relationship, provided there is no break. The Chief Justice of Ontario also pointed out (p. 305) that in the *Fry* case the judgment could be supported on another ground, viz., that the right to treat the respondent as bailiff rested upon equitable principles, and, in the circumstances of the case, the plaintiffs were precluded by their acts and conduct from invoking the equitable doctrine upon which they relied.

The facts in the *Fry* case shewed a clear break in the relationship of guardian and bailiff. The whole family left the premises and went to the States, and after some time the stepmother left her stepchildren with their grandmother at Dubuque, and returned with her husband and her own child and retook possession; and it was held that this circumstance made a break which terminated her position of bailiff, and the statute then began to run and ripened her title into a title by possession. And, in the light of the facts in that case, it clearly supports the principle of law here rested on, and declares that the possession of the stepmother after her first husband's death, as bailiff for her children, under which the statute would not run, cannot be denied; but that relationship came to an end when she returned to Canada, leaving there all the children except her own daughter, and re-entered into possession.

After Farquhar's death, the defendant did not do anything to cause a break in their relationship up to the time he sold the land for right of way to the Canadian Northern Railway Company.

The defendant is asked by his own counsel:—

"Q. Was there any change after Farquhar's death in the method of using the property? A. Not a bit, just went on the same. (The plaintiff had no cattle.)



"Q. During the five years after Farquhar's death was there any kind of change in the way of using the property? A. No, I can't say there was any change—just acted just the same.

"Q. Just the same—turned your cattle into it just the same? A. Yes.

"Q. Did the plaintiff at any time ever even assume to run things about there at all? A. No, sir, not much.

"Q. Did he ever have anything to do with the management of the farm? A. Nothing at all.

"Q. You say he was at no time in possession of the lot? A. No, sir.

"Q. Did he go after the cattle sometimes? A. Yes.

"Q. Just as if he were your son? A. Yes."

Being notified by John S. Cameron, his co-executor, the defendant paid the legacies in 1879 after the plaintiff had left. He had in his hands more than sufficient to pay them.

Referring to the time after the plaintiff left, the defendant was asked:—

"Q. How have you used the property? A. I just used it as we always did. We cut a piece of wood towards the Montreal road.

"Q. What have you done with the bush on this property? A. We have taken stuff all over it, what we needed—dry stuff or anything like that; and we preserved the other pretty good; not cutting it or slashing it or wasting it.

His Lordship: "Q. You used the bush to the best advantage in taking out what you wanted, timber and so, sparing the green trees? A. Yes."

In my opinion, the present case should be treated in the same way as one between father and son, as the defendant was undoubtedly *in loco parentis* to the plaintiff until he in fact left Canada. See Simpson's Law of Infants, 3rd ed., pp. 99-101. Also see the late case of *McMahon v. Hastings*, [1913] 1 I.R. 395, following *Quinton v. Frith* (1868), I.R. 2 Eq. 396. It was held in the *McMahon* case that a person entering upon an infant's estate, with notice of the infant's rights, becomes his bailiff, and he continues to be such bailiff, notwithstanding the infant's coming of age, until the relationship is dissolved by some other circumstance or combination of circumstances. A demand of possession by an infant would be such a circumstance.

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When once it is shewn that possession is taken by a person as bailiff, he continues to hold possession in the same character unless something is done to change the character of his possession.

In *Tinker v. Rodwell* (1893), 69 L.T. 591, an infant 12 years of age became entitled in 1840. His father entered into possession and so remained until his death in 1866. The father's widow then entered into possession. The infant attained the age of 21 years in 1857. The action was not brought until 1893. Romer, J., held that the plaintiff was not barred by the Statute of Limitations; he limited the account of rents to six years from the date of the writ. He refers to *Thomas v. Thomas*, 2 K. & J. 79, and points out that there is an error in the head-note in that case, which is so framed as to lead to the supposition that the Vice-Chancellor had decided that the Statute of Limitations would run as of course in favour of the father as from the date of the son attaining 21, and says (p. 592): "But the Vice-Chancellor decided no such thing. . . . The Vice-Chancellor's opinion . . . was that, if the father retained possession after his child attained 21, his possession continued to be as guardian of his child, and this is made free from all doubt by his express decision on the point at p. 86, where he held that in the case before him the father remained in possession as guardian until his death, which was nearly sixteen years after the son attained 21 (see pp. 80 and 81). And I think that this view is one which, in the interests of justice, ought to be rigidly upheld as between father and son." And he refers to *Wall v. Stanwick* and *In re Hobbs*, above cited.

I am of opinion that the defendant's claim by possession fails.

I am also of opinion, having regard to the circumstances of the case, that the defendant's position was that of bailiff of the plaintiff in respect of the premises, and that such relationship was not changed at least until the 15th July, 1908, when the defendant conveyed 31<sup>4</sup>/<sub>100</sub> acres to the Canadian Northern Railway Company, and received \$346 therefor.

This may have amounted to a repudiation of his position as bailiff, and so constituted a break, so that the statute would begin to run. This it is unnecessary to decide, as it is in any event ineffective from lack of time to complete title by possession. The statute could never in fact until then have commenced to run against the plaintiff, and the case falls within the principles enunci-

ated by Armour, C.J., and approved by the Court of Appeal in *Kent v. Kent*.

In the present case the defendant, according to his own evidence, continued the use of the property as had been done during the life of Farquhar and until the plaintiff left. Up to that time, during the infancy of the plaintiff, he stood *in loco parentis* to the plaintiff; it was by virtue of that position and the residence of the plaintiff with him that he enjoyed the use of the property to the extent that he did; he never pretended at any time, to the knowledge of the plaintiff, to have changed his position in regard to the property, and his conversation with the plaintiff on his return confirms the view that he treated the property as belonging to the plaintiff.

Since the above was written I have had the opportunity of reading the judgment of Meredith, C.J.O., in *Taylor v. Davies*, not yet reported,\* in which he points out the cases in which a constructive trustee has for the purpose of the Statute of Limitations been held to stand in the same situation as an express trustee. These cases are classified by Bowen, L.J., in *Soar v. Ashwell*, [1893] 2 Q.B. 390, 396, 397.

The judgment given at the trial should be reversed, and judgment entered for possession for the plaintiff, with costs of the action and of this appeal.

MULOCK, C.J.Ex.:—I have read the able and exhaustive judgment of my brother Clute, and agree in the result which he has reached. I do not think the acts relied upon by the defendant were such as to give him a title to the land under the Statute of Limitations. Those acts are: payment of taxes, fencing, cutting and removing timber from and pasturing cattle on the lands in question. In order to acquire title under the statute, open, visible, and continuous possession is necessary. The cutting and removal of timber and the pasturing of cattle in this case were but intermittent acts of trespass and do not constitute possession as against the true owner. As each act of trespass ceased, the possession *quoad* the defendant became vacant, and the law presumes that the real owner then resumed possession. Thus, even if such acts

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\*Now reported, 41 O.L.R. 403, 410-441.

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constituted possession, the Statute of Limitations ceased to run at the moment when each act of trespass ceased, and therefore there was no continuous possession.

As to the fencing, only three sides of the land were fenced, and none of it by the defendant, but by neighbours for the purpose of fencing in their own lands. The fourth side bordered on the Ottawa river, and was unfenced. Mere fencing, or payment of taxes, unaccompanied by actual, visible, and continuous possession, could not give a title.

For these reasons, I am of opinion that the defendant did not acquire title under the statute, and the appeal should be allowed with costs here and below.

RIDDELL and SUTHERLAND, JJ., agreed with CLUTE, J.

FERGUSON, J.A.:—I cannot agree in the argument of counsel for the plaintiff that the defendant may, in the circumstances of this case, be considered as having at any time held possession under colour of right, either as bailiff for or as a person standing *in loco parentis* to the plaintiff.

In my opinion, the acts of entry made during the infancy of the plaintiff were in their nature and effect wasteful, and not such as to justify us, even with the assistance of the presumption referred to in the cases, in finding that these acts were entries made with the intention or for the purpose of benefiting or protecting the infant's property: see *Fry and Moore v. Speare*, 34 O.L.R. 63, 26 D.L.R. 796, 36 O.L.R. 301, 30 D.L.R. 723. Where, however, intention cannot be found as a fact but fiduciary relationship is imposed simply by construction or operation of law only, see *Taylor v. Davies*, 13 O.W.N. 323.\*

There is no doubt that the defendant, while the plaintiff was an infant and after he became of age, with his knowledge and acquiescence, did enter upon the lands in question and cut timber and firewood and pasture his cattle. In my opinion, such entries should, however, in their effect, be limited to the purposes for which they were made and not be treated as entries made or permitted for the purpose or with the effect of putting the defendant in possession of the whole property. If such be their legal effect,

\*Now reported, 41 O.L.R. 403.



then in my opinion the subsequent entries made without knowledge were mere acts of trespass; and, for the reasons given by my brother Clute, I agree with him that these trespass entries, coupled with the subsequent acts, use and occupation, sworn to on behalf of the defendant, do not make out that open, exclusive, and continuous possession necessary under the authorities cited to extinguish, in favour of a trespasser, the plaintiff's paper title.

I would allow the appeal with costs.

*Appeal allowed.*

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[APPELLATE DIVISION.]

MERCANTILE TRUST CO. OF CANADA LIMITED v.  
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*Contract—Services Rendered by Niece of Deceased Intestate—Agreement to Pay for—Evidence—Implication—Presumption—Rebuttal—Sums Intrusted to Niece, not a Gift—Account—Set-off.*

The defendant, in December, 1908, brought her aunt, who was suffering from an incurable disease and required much care and attention, to her (the defendant's) house, where the aunt lived for nearly a year and was cared for by the defendant; the defendant and her aunt then went to live with the defendant's sister, at whose house the defendant cared for the aunt until the aunt's death in November, 1911. In October, 1910, the aunt gave the defendant a large sum of money, and a larger sum in January, 1911. The administrators of the aunt's estate sought an account of these sums:—

*Held*, upon the evidence, and having regard to all the circumstances, that the moneys were not a gift to the defendant, but were intended to enable the defendant to pay the costs of the maintenance, nursing, medical supplies, and other necessities, of the aunt; and that, in accounting, the defendant was entitled to credit for a reasonable sum for her services, in addition to the sums which she had disbursed on her aunt's account—the evidence being sufficient to rebut the presumption, arising from the relationship of aunt and niece, that the services were gratuitous.

Review of the authorities.

*Walker v. Boughner* (1889), 18 O.R. 448, approved.

ACTION by the company, as administrators of the estate of Ellen Broderick, deceased, against Minnie Campbell, a niece of the deceased, for an account of all moneys of the deceased in the hands of the defendant.

The action was tried by LATCHFORD, J., without a jury, at Toronto.

*T. N. Phelan*, for the plaintiffs.

*T. R. Ferguson*, for the defendant.

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October 29, 1917. LATCHFORD, J.:—I find, upon the evidence, that the defendant is liable to account to the plaintiffs for the moneys which she received from her aunt, Miss Broderick, and did not expend on her aunt's account during her lifetime or pay after her death for funeral or other expenses and for the erection of a monument over her grave.

Such moneys include the \$150 with which the defendant's trust-account in the Bank of Montreal was opened on the 6th January, 1909, and all deposits subsequently made to the credit of that account; and, in addition, the \$2,538.62 which the defendant had credited to her personal account in the same bank on the 19th January, 1911. I entertain not the slightest doubt that every dollar deposited in the trust-account was provided by the deceased. It is significant that the last deposit was the \$1,357.30, the proceeds of a draft drawn by the deceased on New York.

In reaching these conclusions, I am obliged to reject the testimony of the defendant, both because of the manner in which it was given, and because inconsistent in great part with the facts disclosed by the deposit-slips, the bank-account itself, and with the admission of the defendant in the letter of the 21st December, 1912, after her aunt's death, that the unexpended balance was her aunt's money. She did not at that time think of contending, as she now contends, that she was entitled to what remained. The plaintiffs may amend so as to claim a declaration that not merely the \$2,538.62 but the \$1,357.30 and all other credits in the trust-account were the moneys of the deceased. They may also make the \$200 deposited by the defendant to the credit of her personal account on the 20th January, 1909, the subject of claim and investigation.

I find that the defendant's trust-account was in fact Miss Broderick's account. It was opened in the defendant's name as a matter of convenience and necessity arising out of the nature of the malady from which the deceased suffered. The disease was progressive. At first Miss Broderick required little attention. She was possessed of ample means. The defendant, on the other hand, had nothing but a small salary. No reason existed why the deceased should be a burden to her niece. I have no doubt that the debits in the trust-account prior to the removal of the defendant and Miss Broderick to the Slanker house represent all that

was payable on any account to the defendant. She had control throughout this period of sufficient funds belonging to her aunt, and there was no reason why she should not have used them for her aunt's benefit. No attendance on the aunt was necessary during this time. Nor was any personal service necessary beyond what the defendant was able to render before and after her office hours. Even later, when the progress of the disease confined the aunt to bed, it does not appear that the defendant lost any time from her ordinary calling. Up to August, 1910, the defendant says that what she did for her aunt was without expectation of benefit or reward. The bargain was then made, she alleges, which warrants her defence. Whether regarded as an agreement or an actual gift, what happened does not, I find, sustain her contention. Her own statement of it I cannot accept, and the testimony of McMorris, as first given, affords no corroboration. What he said later was clearly the result of suggestion.

It was only after it became certain that her aunt's death was not far off that the defendant used any of the moneys deposited in the trust-account for her own purposes. How much was so applied, in addition to the cheques to Mr. Millar, is a matter for inquiry upon the reference.

The payment in 1913 of \$1,000 to Mrs. Slanker should be carefully investigated. No satisfactory reason for so long withholding any such sum, if due, was given by the defendant or any other witness.

There will be judgment requiring the defendant to account for and pay over to the plaintiffs all moneys received by her from or on account of the deceased. Reference to the Master in Ordinary. The defendant should pay the costs of the trial. Costs of the reference and further directions reserved until after the Master has made his report.

The defendant appealed from the judgment of LATCHFORD, J.

March 25 and 26, 1918. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and KELLY, JJ.

*T. R. Ferguson*, for the appellant, argued that the sums of money received by the appellant from the deceased were a gift; or, in the alternative, that the appellant should be allowed \$2,980.03

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for remuneration for services rendered the deceased during her three years' illness, and for her support, maintenance, medical attendance, nursing, and other such expenses.

*T. N. Phelan*, for the plaintiffs, respondents, contended that the moneys never passed as a gift from the deceased to the appellant. As to payment for services and support, nothing could be allowed under these heads, on account of the relationship of the parties, the deceased having been the aunt of the appellant.

*Ferguson*, in reply, said that the legal presumption that the services had been rendered gratuitously on account of the relationship of the parties was rebutted by the evidence—there was an implied agreement between the deceased aunt and the appellant that the latter should be compensated: *Walker v. Boughner* (1889), 18 O.R. 448.

May 1. M<sup>ULOCK</sup>, C.J.Ex.:—This is an appeal from the judgment of Latchford, J. The action is brought on behalf of the next of kin of one Ellen Broderick, deceased, for an account of all moneys of the deceased in the hands of the defendant.

In the statement of claim the defendant is charged specifically with having converted to her own use \$2,600, the property of Ellen Broderick. The defendant denies such conversion and alleges that in January, 1911, the deceased, being indebted to her for board, lodging, and nursing, paid to her the sum of \$2,538.62 in payment of such indebtedness and in consideration of the defendant's promise to continue to look after her and keep her for the remainder of her life, whereby the defendant says the said sum became her own money absolutely. But, if it should be held that it did not, then she claims the right to set off against it the moneys paid by her on behalf of the deceased; also a proper allowance for services rendered by the defendant for the care and maintenance of the deceased, and also moneys paid by the defendant on account of the deceased's debts and funeral expenses.

At the trial it appeared that the defendant had received from Ellen Broderick two sums of money, \$1,357.30 in the month of October, 1910, and the said sum of \$2,538.62 in the month of January, 1911; and the judgment of the Court was that she was accountable to the plaintiff company as administrators of Ellen Broderick's estate, in respect of these two sums, and also of any other moneys of the deceased coming to her hands.



The judgment also directed an inquiry as to the plaintiffs' right in respect of the sum of \$200 standing at the credit of the defendant in the Bank of Montreal on the 20th January, 1909.

The learned trial Judge, I think, rightly decided that the said two sums of \$1,357.30 and \$2,538.62 did not become the property of the defendant; and the real question for us to determine is, whether the defendant is entitled to remuneration for services rendered to the deceased by the defendant and her sister, Mrs. Slanker. This question calls for consideration of the facts, and I shall now proceed to deal with the evidence bearing upon it.

Up to December, 1908, Ellen Broderick had always been a resident of the city of New York, where she was engaged in domestic service, and had accumulated between \$4,000 and \$5,000, which she had on deposit in two savings banks in that city. She had then reached the age of 60 years. For some years she had been suffering from cancer of the rectum, and became anxious to move to Toronto and live with the defendant, her niece, daughter of Ellen Broderick's sister. On two occasions the defendant was in New York, and on each occasion spent a couple of days with the deceased. She also corresponded with her. Such was the extent of the acquaintance between them. There is no evidence to shew any special degree of affection. The acquaintance between them must have been of a very casual character, for the defendant had only seen the deceased a couple of times. The deceased was a friend of the McMorrins, a New York family, and when unemployed made their house her home, and was godmother to two of the McMorrin children. In December, 1908, her malady incapacitated her for work, and she went to the McMorrins' house, where she stayed for a week. When there, she expressed a wish to go to Toronto to reside with the defendant, and requested Mr. McMorrin to telegraph the defendant to come to New York for the purpose of taking her (the deceased) to Canada. Mr. McMorrin, on her dictation, sent to the defendant a telegram in the following words: "Your auntie is sick. Please come and take her to Canada."

Acting on this telegram, the defendant proceeded to New York, and brought her aunt to her (the defendant's) home in Toronto, in December, 1908, where the aunt resided until November, 1909, when she went to live with the defendant's sister, Mrs. Slanker, also a resident of Toronto; and at Mrs. Slanker's house the aunt continued to live until her death in 1911.

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During her residence with the defendant and her sister, the deceased's malady steadily increased. The discharge became so copious as to call for constant attendance, notwithstanding which it at times polluted the atmosphere of the house to the great inconvenience of the occupants. On the way from New York the deceased, according to the defendant's evidence, said: "How will I arrange? Shall I pay you any board?" To which the defendant answered: "No, Auntie, you will not; just come to my house and stay there with me."

At this time the defendant thought the deceased was only temporarily ill and making a temporary visit, but would soon return to New York, and no arrangement was made for her paying the defendant for her services. Instead, however, of her recovering, she became worse, and the defendant boarded and maintained her and made many disbursements on her account out of her own moneys.

About July or August, 1910, the aunt was invited to take up her residence with certain nieces at Hamilton, but she refused, and it was then arranged between her and the defendant that she would live permanently with her. Then, according to the defendant's evidence, the deceased said to her: "It is not right that I should be living like this and not turn some money over to you; you have spent a great deal on me;" adding that, as she was going to live with the defendant, who had spent a good deal of money on her, she would turn over her money to her.

On another occasion she said to the defendant, "I had better give you a cheque on New York," and added: "Now if I get sick, I want a trained nurse. If I am very ill, I want two, but don't ever send me to a hospital." Later the deceased wrote to Mr. McMorris to come and see her. He came, and she then gave him a cheque for \$500, being a present for her two godchildren, adding, according to Mr. McMorris's evidence, "All that I have I am going to give to Miss Campbell to care for me as long as I live," or words to that effect. Subsequently, according to McMorris, she spoke to the same effect in the presence of the defendant, her words being, "The balance of whatever I am possessed of, money or anything else, is for you to look after me."

These conversations with McMorris occurred in August, 1910. In October, 1910, the deceased required a trained nurse;

and, according to the defendant's evidence, then offered to pay over to her the two sums on deposit in New York; but, as their withdrawal would involve a loss of interest, the defendant advised that only the smaller amount, \$1,367.30, on deposit in one of the banks, be then withdrawn. Accordingly, the deceased then gave her a cheque for the \$1,367.30, and in the following January gave her a cheque for the other sum, namely, \$2,538.62. According to Mrs. Slanker's evidence, the deceased on several occasions told her that she had given her money to the defendant and that she would take care of her as long as she lived and would pay Mrs. Slanker in full. After Ellen Broderick's death, the defendant did pay to Mrs. Slanker \$1,000, being at the rate of \$10 a week for 100 weeks' board of the deceased. When the defendant went to New York to bring her aunt to Toronto to live with her, she was employed in the office of Eby Blain & Co., Toronto, at a wage of \$10 per week, and this was the rate of her earnings during the whole time that the deceased resided with her and Mrs. Slanker.

On this state of facts, the defendant claims to be entitled to payment on a *quantum meruit* basis for board and services rendered to the deceased for the year during which she resided with the defendant and the two subsequent years during which she resided with Mrs. Slanker. The deceased having been the defendant's aunt, the onus is on the defendant to shew an agreement, express or implied, that she was to be remunerated for her services. The question is one of fact. If the circumstances make it manifest that both parties understood that the defendant was to be compensated for her services, she is entitled to recover their value: *Walker v. Boughner*, 18 O.R. 448. The law imputes to parties an intention corresponding to the reasonable meaning of their words and actions: *Reeve v. Reeve* (1858), 1 F. & F. 280.

With reference to the evidence of the defendant, the following circumstances satisfy me that, when it became apparent that the deceased was making her permanent home with the defendant, both parties contemplated the defendant being remunerated for her services. The deceased, being possessed of a considerable sum of money, could not reasonably have expected that the defendant, living on a weekly wage of \$10, would have gratuitously undertaken the care and maintenance of her during her illness. The deceased must have been well aware from the nature of her malady that

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she could not live long, and she told McMorris that the money which she was going to give to the defendant would, she thought, take care of her during the rest of her life.

The payments by the deceased to the defendant must have been either for the purpose of giving them to the defendant absolutely, or in order to enable her throughout to pay for maintenance, nursing, medical supplies, and other necessities. There was no intimacy between the parties, and no such feeling of affection on the part of the defendant towards the deceased as might naturally prompt the defendant or would lead the deceased to expect that the defendant would be willing personally to defray the cost of maintenance, nursing, and caring for her. Further, so far as appears, the defendant's means (a weekly wage of \$10) were too limited to enable her out of them to defray the expenses in connection with her aunt. For many months before the deceased made the payments to the defendant, the deceased had been personally cared for by the defendant and her sister, they performing all the duties of a nurse and providing for all her needs. The deceased, a woman of considerable means, realised that it was unfair to expect these services to be rendered gratuitously; and the proper inference, I think, is that the moneys paid to the defendant were for the purpose of paying those expenses and for the services rendered. If not, there was no need of her paying such a large sum to the defendant. Further, it is to be borne in mind that the deceased had no dependents or nearer relatives. The evidence of Mr. McMorris and Mrs. Slanker shews that the deceased made the payments for the purpose not only of remunerating the defendant in respect of past services but also to provide for a continuance thereof.

If this case had been tried by a jury, these circumstances could not have been withdrawn from the jury, and would have warranted the finding of an implied agreement for remuneration, and this Court is entitled to draw the same conclusion, which is, I think, the proper one. The circumstances upon which I am dwelling not being in dispute, this Court is in as good a position as was the trial Judge to draw the proper inference; I entertain no doubt that both parties expected that the defendant would be properly remunerated; and, therefore, she is entitled to payment for the services of herself and her sister in the maintenance and care of the



deceased, and of all reasonable expenses in providing her with medical and other attendance, medicines, medical supplies, and also funeral expenses.

In her statement of defence and set-off, the defendant has given particulars of her claim, amounting to \$2,980.03. The claim seems a reasonable one; and the cost of a reference should, if possible, be avoided by the plaintiffs consenting to the defendant having credit for \$2,980.03 on the two sums in question; but, if the plaintiffs are not so willing, then they may have a reference; and, in such event, the defendant may amend her claim of set-off by claiming an amount in excess of that set forth in the particulars. Costs of the reference should be in the discretion of the Master.

The judgment will declare the defendant entitled to remuneration for her and her sister's services, and it will be for the Master to fix the amount. I think clause (b) of para. (2) of the judgment should be struck out.

The defendant is entitled to her costs here and below, in the first instance to be deducted from the balance, if any, found due by her on taking the accounts, otherwise to be payable by the plaintiffs; and, subject to the payment of the defendant's costs, the plaintiffs are entitled to be paid their costs as between solicitor and client out of the remainder of such balance.

CLUTE, J.:—Action tried without a jury before Latchford, J. Appeal from the judgment of the learned trial Judge dated the 29th October, 1917.

The plaintiffs are the administrators of the estate of Ellen Broderick, who died at Toronto on the 4th November, 1911, intestate.

The plaintiffs ask an account against the defendant. The two principal items claimed, which came to the hands of the defendant, are:—

October 10, 1910—\$1,357.30, being the amount of Miss Broderick's cheque for \$1,359, less bank charges.

January 19, 1911—\$2,538.62.

The defendant claims these amounts as a gift, and, in the alternative, claims \$2,980.03 for expenses in the support and maintenance of the deceased and for doctor's bill, nursing, and medical

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and other expenses incidental to the illness of the said Ellen Broderick for three years.

The statement of claim was in respect of the larger sum only, and the earlier sum is not referred to; the defendant was examined for discovery, and did not frankly state the facts in regard to the amounts which had come into her hands, by reason of which she prejudiced her own case. She also wrote a letter dated the 21st December, 1912, in which she suggests that the money was still intact, and the family to whom she was writing was entitled to one-third. This was not true, and the trial Judge, under the circumstances, refused to support the gift.

During the argument the Court intimated that the alleged gift of the above sums by the deceased to the defendant could not be sustained.

The further question remains: namely, the claim by the defendant for board, lodging, care, nursing, and expenses of the said Ellen Broderick for the three years or thereabouts prior to her death.

The principal facts are not disputed. Ellen Broderick was the aunt of the defendant. She had gone to New York over thirty years ago, and had accumulated at least the amounts above mentioned, which she had deposited in a New York bank. The defendant on two occasions had visited her aunt in New York for a few days, but Miss Broderick had not visited the defendant; their relations, while friendly, were not intimate, apparently.

We learn the condition of Ellen Broderick, prior to her leaving New York for Canada, from the witness McMorris, who had resided in New York for over 30 years, and had known Miss Broderick for 28 or 30 years. She had been a housekeeper; and in November or December of 1908 she sent word to McMorris's wife that she was ill and was unable to perform her duties as housekeeper any longer, and she sent for McMorris to take her away. He went to where she was employed in a taxicab and took her to his home and kept her there for one week. She expressed a wish to go to Canada; she said she wished to go to her niece Minnie Campbell (the defendant) to end her days, and requested that a telegram be sent to the defendant to come and take her to Canada. She dictated the telegram; McMorris wrote it out and sent it. It read: "Your auntie is sick. Please come and take her to

Canada." The defendant went and brought her aunt to Toronto, and took her to reside with her at 315 Church street, where she remained for a year. The defendant then made arrangements with her married sister, Clara Slanker, that her aunt and herself should reside with Mrs. Slanker, which they did until the death of Ellen Broderick on the 4th November, 1911.

It appears that no express bargain was made between the deceased and the defendant during the time she was residing with the defendant in Church street.

Dr. Herrington describes the condition of Ellen Broderick from the time he was called in. The doctor states that she required constant attention; he saw her during the later stages of the disease, during the time when the treatment would be most trying, and when she would require the most efficient nursing. The case was one of cancer of the rectum, and one of the most disagreeable cases he had ever attended. When he first saw the case, it was beyond operative intervention; he had four or five different nurses, three of them gave up the case on account of its disagreeable character; the odour was so offensive that it was perceptible at the front door when she was in the attic; everything that came into contact with her had to be destroyed.

"Q. Did you see who was looking after her there and who had charge of her? A. Yes.

"Q. Who was it? A. Mrs. Slanker and Miss Campbell—Miss Campbell in particular.

"Q. What was the character of the attendance; was it careful or otherwise? A. I think, most careful. I said to Miss Campbell at the time I didn't see how she could carry on her day-work and do this work at night . . . I was rather solicitous about Miss Campbell's condition. I understood she had a very responsible position in the city and she was working in the day-time and looking after her aunt at night, which I thought was a very difficult proposition."

In cross-examination the doctor states that he looked upon Miss Campbell as being the person in charge.

Mrs. Clara Slanker stated that she was the niece of the late Ellen Broderick and a sister of the defendant; that her aunt was in such a condition in New York that she could not take care of herself; that she wished the defendant to come and get her, which she did; that was in December, 1908.

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The aunt had never been at Mrs. Slanker's before; she came there ill; nor had she visited the defendant in her life before. She states that during the year Miss Broderick resided with the defendant she was ill all the time.

"Q. She was ill when she came there? A. Yes. When she came there she needed attention that no person but some younger girl friend could give her. That is what she needed when she came to my sister's house.

"Q. She had this disease the doctor spoke of? A. She had had it for a number of years, and that's why the people she was with in New York wanted to get rid of her. They wanted her to come up here.

"Q. Who cared for her and looked after her? A. My sister did, Miss Campbell.

"Q. Would your aunt's trouble require attention in 1909? A. Some weeks it would; some days it might not. It was a case of where—I couldn't explain it to you.

"Q. Did your sister and Miss Broderick move over to your house? A. Yes; they moved over to my house. A. My aunt lived with me for two years.

"Q. . . . from November, 1909, until the time of her death in 1911? A. Yes.

"Q. Was Dr. Herrington there attending her? A. One day I had to put out a big washing for my aunt of heavy pads. She slept on pads. If this cancer of the rectum was running we had to change these pads as often as it would flow on to the bedding. If we didn't remove them at once we couldn't stand the odour in the house. I happened to be alone one day and I had to take a basket of this stuff out to wash it and put it on the line. I don't know if I fainted or what happened to me, but a man building a house on the opposite side of the street came over and told me I had been lying in the yard for some time.

"Dr. Herrington came to see me and wanted to know the cause of my condition. I told him it was my aunt, and he went up and examined her. That would be in the spring or summer of 1910. I had to have attendance of some kind all the time she was at my house.

"Q. Did that make much inconvenience and trouble there? A. Auntie really had my house, the use of my home.



"Q. Your house was practically given up to her? A. Yes.

"Q. Your sister, Miss Campbell, would work during the day-time at Eby Blain's? A. Yes.

"Q. At night what was she doing? A. I guess we bathed auntie every night at 7 o'clock.

"Q. You say Miss Campbell was doing that? A. The nurse would leave. It took two of us to attend to her. I attended to her with the nurse in the day-time, and my sister and I would attend to her at night. I was taken ill as a consequence of it, and Dr. Herrington ordered me to go away . . . There had to be material burned every day.

"Q. This material which was used . . . was purchased by whom? A. By Miss Campbell . . . She used to send up absorbent cotton by the bundles and cheese-cloth by the web. We used to make pads a yard square and about two inches thick."

The deceased had nieces residing in Hamilton, who came over to see her in the spring of 1910 and wished their aunt to go and reside with them at Hamilton. She went on a Friday and returned a week from the following Sunday; 8 or 9 days away. Miss Broderick said she could not live there, and refused to remain. They said that their mother had left it in her "will" that she should have a home there. Miss Broderick said she didn't see how any person could "will" where she would live. "When she came back, she asked if she could have her home again. She said: 'Clara, can I have my home back again? Will Mr. Slanker object?' I said, 'No, auntie, you come right in.' She started to cry. I got her room fixed up and had her taken to it."

Her relatives came again to see her, and she declared she would drown herself rather than go and live with them. It was at this time that the witness McMorris came over. The deceased repeatedly told Mrs. Slanker that Miss Campbell would pay her for any expenses she was put to; that the defendant had the money and would pay her. She also said that the defendant would take care of her as long as she lived; that she was sure of. She told her this when McMorris came over in August to see her. She then gave him \$500 for his two sons for whom she was godmother. She told Mrs. Slanker that she had given the defendant money; that she was getting her money from New York for the defendant. The defendant paid Mrs. Slanker at the rate of \$10 per week, \$1,000

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in all. Mrs. Slanker said that she understood that she would be paid from the moneys that her aunt had given to the defendant. This claim was not paid until the 5th November, 1913. McMorris also corroborates the witness Mrs. Slanker, and states that the deceased wrote him to come to Toronto. He came up in answer to the letter, and she gave him a cheque for \$500, and she told him at the time: "What I have got I want to give to Miss Campbell to look after me as long as I live. What I have got I intend to give it."

Evidence of McMorris: "When she gave me the cheque for \$500, she said: 'I promised you that for the boys long before I came from New York. I want to give it to you now; and whatever I have, or all that I have, I am going to give to Miss Campbell, to care for me as long as I live.' On another instance—Miss Campbell might have been there afterwards—but we talked this thing over again about the \$500. She said: 'I want to get rid of that, because, for one reason, later you may not be able to get it;,' and Miss Campbell was there, and she told Miss Campbell the same thing.

"Q. What did she say to Miss Campbell about the \$500?

A. She said: 'Minnie, I am going to give Robert the \$500 for the two boys, which is \$250 each, and what I have got is for you, the balance of whatever I am possessed of, money or anything else, is for you to look after me.' "

The first amount was deposited to the defendant's credit in her general account, which had been a trust-account, and was continued in the same form. The second sum was deposited to the defendant's credit in her savings-account.

I think there is quite sufficient evidence, exclusive of that of the defendant, clearly to rebut the presumption as between relatives that no charge is to be made for board, lodging, nursing, and services.

At the time the defendant was sent for, the deceased Ellen Broderick was suffering from an incurable malady, by reason of which she was unable to continue her employment, as house-keeper, and had to seek refuge for the time being with her friends the McMorris. At her request, the defendant went to New York and brought her to Toronto to be cared for; she had means to pay her way. When she had tried for a few days, at the request of

other relatives, to live with them, she returned to the defendant: and on two distinct occasions she brought over sums of money which she had deposited to her credit in a bank at New York and gave these amounts to the defendant, and the same were deposited in the defendant's accounts. She told the defendant's sister and Mr. McMorris that she intended this money to be expended for her care and benefit, and that she had given it to the defendant for that purpose.

Her malady was incurable and was of such a nature that she required constant and unremitting care.

I see no reason to doubt that she intended to do what she did do, that is, to have the money which she placed in the hands of the defendant expended in her living and for nursing and every care and attention which she received. It is incredible to me that she intended to sponge upon her relatives for the unremitting care and attention which she received.

I think the case is clearly within that class of cases where a person becomes liable for her support, maintenance, and nursing, notwithstanding the relationship that exists between the parties.

The general question is considered in *Peckham v. Depotty* (1890), 17 A.R. 273, and cases there cited. In referring to the case of *Foord v. Morley* (1859), 1 F. & F. 496, where Martin, B., said that "the plaintiff must establish that there was an understanding, arrangement, or contract that she should be paid for her services," Osler, J.A. (17 A.R. at p. 278) said: "This, of course, is not to be understood as affirming that proof of an express contract is necessary. And no doubt the general rule is that stated by Channell, B., in *Browning v. Great Central Mining Co.* (1860), 5 H. & N. 856: that where services have been rendered it ought to be clearly shewn that those services were not to be remunerated. The presumption may be rebutted by circumstances, as in the well-known class of cases, of which there are so many examples in our reports, of actions brought by one relative for services rendered to another while living with the latter as a member of his household." See also *Walker v. Boughner*, 18 O.R. 448; *Smith v. McGugan* (1892), 21 A.R. 542, and *McGugan v. Smith* (1892), 21 S.C.R. 263, in which Strong, J., says (p. 265): "This, then, is not a case in which to apply any presumption arising from the relationship of the parties that the services were rendered gratui-

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tously." See also *Murdoch v. West* (1895), 24 S.C.R. 305; *Latimer v. Hill* (1916), 36 O.L.R. 321, 30 D.L.R. 660; *Mather v. Fidlin* (1916), 10 O.W.N. 229; *Herries v. Fletcher* (1914), 6 O.W.N. 587, 589; *Johnston v. Brown* (1909), 13 O.W.R. 1212; *Re Rutherford* (1915), 34 O.L.R. 395, 25 D.L.R. 782; *Rycroft v. Trusts and Guarantee Co.* (1917), 12 O.W.N. 240; *Cross v. Cleary* (1898), 29 O.R. 542.

Under this class of authorities, and on the undisputed facts, I think it clear that the services rendered were not intended upon either side to be gratuitous; and the fact that the deceased handed over her money for the very purpose of making payments in respect of these services is conclusive to my mind that a gratuity was not asked for or given in respect to them; it is a question of *quantum meruit*.

The amount claimed by the defendant, \$2,980.03, is, in my opinion, reasonable, and, the plaintiffs consenting, the defendant should have credit for that amount on the two sums come to her hands; otherwise there should be a reference to the Master, with leave to the defendant to amend by claiming an amount in excess of her particulars.

The judgment below should be set aside and the counterclaim sustained. The defendant is entitled to her costs here and below, in the first instance to be deducted from the balance, if any, found due by her in taking the accounts, otherwise to be payable by the plaintiffs—and, subject to the payment of the defendant's costs, the plaintiffs are entitled to be paid their costs as between solicitor and client out of what (if anything) remains of such balance. Costs of the reference to be in the discretion of the Master.

RIDDELL and KELLY, JJ., agreed.

*Appeal allowed.*



[MIDDLETON, J.]

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May 3.

## NATHANSON V. GRAND TRUNK R.W. CO.

*Railway—Carriage of Goods—Receipt for Number of Packages Stated by Shipper—Shortage in Delivery—Effect of Receipt—Primâ Facie Case against Carriers—Evidence to Displace—Preponderating Probability—Burden of Proof.*

The plaintiff, intending to move his business from A. to T., sent a number of packages of goods to the railway station at A., and was allowed to place them in a car. A few minutes before his own departure from A., the plaintiff applied to the defendants' agent there for a shipping bill for the packages in the car. The agent handed him a bill, but did not count the packages; the bill stated the number of packages, according to the plaintiff's statement, with the addition of "S. L. & C.," which was said to mean "shipper's load and count." The car was immediately sealed by the agent, with the packages uncounted. In due course the car arrived at T., accompanied by its way-bill, and when it arrived it had not been tampered with. It was unloaded by a checker, and it was found that there were four packages short of what were called for in the way-bill. The plaintiff was advised of the arrival of the car; he paid the freight, and delivery was made, the delivery-notice being marked "four pieces short."

This was based upon the documents and the count made by the checker:—

*Held*, that, as regarded the plaintiff, no effect could be given to the placing of "S. L. & C." upon the shipping bill, nor to the explanation given to him by the agent, that, there being no opportunity to count, his count would have to be accepted.

*Held*, also, that, while the shipping bill was a receipt for the goods, it was not conclusive, and might be controverted by evidence shewing that the goods were not received: the agent had no authority to make a contract of carriage binding on the defendants, save in respect of goods actually received by him; the receipt was *primâ facie* evidence, and it was upon the defendants to explain it away.

*Leduc v. Ward* (1888), 20 Q.B.D. 475, 479, and *Smith & Co. v. Bedouin Steam Navigation Co. Limited*, [1896] A.C. 70, applied and followed.

And *held*, upon the evidence—weighing the preponderating probability, having regard to the burden of proof—that the defendants had delivered to the plaintiff all the goods that they actually received from him.

ACTION to recover the value of certain chattels said to have been shipped by the defendants' railway from Aylmer to Toronto, and not delivered to the plaintiff, the owner and consignee of the chattels.

May 2. The action was tried by MIDDLETON, J., without a jury, at Toronto.

*George Wilkie*, for the plaintiff.

*D. L. McCarthy*, K.C., for the defendants.

May 3. MIDDLETON, J.:—Nathanson, who had for a short time carried on business at Aylmer, decided to move his business



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to Toronto. He packed his stock of boots and shoes and dry goods in a number of boxes, cartons, and bales, and, without any previous communication with the railway company, called in a carter to ship his goods. The carter applied to the railway company for car accommodation, and was told to place the goods in an empty box-car that happened to be upon a siding a considerable distance from the station. The carter placed these goods and some planks, a counter, and benches, in the car.

Very shortly before the time for the passenger train for Toronto to start, Nathanson arrived at the station and stated his intention of going by that train to Toronto, and asked to be given a shipping bill. The shipping bill was given, but the agent had no opportunity to count and did not count the packages contained in the car. The bill was marked "S. L. & C.," which is said to mean "shipper's load and count"—the effect of this in the eyes of the railway men being, it is said, that the responsibility for the truth of the statement that the number of packages said to have been shipped had in truth been shipped was cast upon the shipper.

I do not think that these initials have acquired any general meaning so that the use of these letters would be understood by Nathanson, nor do I think that the verbal explanation given to him would carry the matter much further. Practically all that the agent told him was that, there being no opportunity to count, his count would have to be accepted.

The car was immediately sealed by the railway agent. He looked into the car at this time, but could not count the number of parcels shipped, as they were in a heap in the car, and would require to be moved before they could be accurately counted. In due course the car arrived at Toronto, accompanied by its waybill, and when it arrived it had not been tampered with. It was placed in the freight-shed for unloading, and was unloaded by a checker and his assistants. Shortly after its arrival, less than two hours after the seal had been broken in the shed, it was found that there were four parcels short of what were called for in the documents. In the meantime an advice-note had been sent out by the railway company to Nathanson in Toronto; and, when he paid the freight, delivery was made, the delivery-notice being marked "four pieces short." All this was based upon the original receipt and upon the count made by the checker. Nathanson

sues for \$1,000, the supposed value of the contents of these four missing cases.

For the reasons already indicated, I pay no attention to the placing of the letters "S. L. & C." upon the receipt, nor to the argument founded thereon.

It is argued for the plaintiff that the statement in the receipt is conclusive, and not subject to any explanation or controversy; and that, it being admitted that thirty-five parcels only were delivered, the railway company is bound to pay the value of the missing parcels. The case of *Mediterranean and New York S.S. Co. Limited v. Mackay*, [1903] 1 K.B. 297, is cited. I do not think that this case justifies the contention.

On the other hand, I think the law laid down in *Leduc v. Ward* (1888), 20 Q.B.D. 475, more particularly the statement of Lord Esher at p. 479, applies here. The shipping receipt is, no doubt, a receipt for the goods, and, as such, like any other receipt, is not conclusive, and it may be controverted by evidence shewing that the goods were not received. The railway agent had no authority to make a contract of carriage so as to bind the railway company, save in respect of goods actually received by him.

This is in accord with the decision of the House of Lords in *Smith & Co. v. Bedouin Steam Navigation Co. Limited*, [1896] A.C. 70.

The receipt, having been given by the agent of the railway company, is *prima facie* evidence, and it is upon the railway company to explain it away.

"Whether it is a receipt for goods, or whether it is a receipt for money, or whether it is a receipt for anything else, I suppose no one can doubt that, without explanation and without shewing that there was some mistake made in the receipt, or that the receipt was given under a mistake, or that it was induced by fraud, the conclusion to which any tribunal having that question before it must necessarily come is that unless displaced by evidence, unless some such topic as that is suggested, the ordinary result follows that the thing which was done as an acknowledgment of the receipt must have its due effect given to it:" *per* Lord Halsbury, L.C., at p. 75.

"The master of a ship has no authority to grant bills of lading for goods which were not put on board his vessel; but, when he

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signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can shew that the whole or some part of it was in fact not shipped:" *per* Lord Watson, at p. 77.

The observations of Lord Halsbury as to the different degrees of weight to be attached to that which is admittedly *prima facie* evidence are here very cogent. The receipt, I think, has cast the onus upon the railway company; but, when the circumstances under which that receipt was given are looked into, it is seen that it was based entirely upon the statements of the shipper, Nathanson; and there is much in his evidence which indicates that it may well have been possible that there was an error in the statement made as to the number of packages shipped.

The question, to my mind, resolves itself into an issue of fact, namely, did the railway company deliver to Nathanson all the goods that they actually received from him? And I have come to the conclusion that this must be answered in the affirmative. The disappearance of all original documents, the absence of all books, the fact that Nathanson signed the statement which he now says was untrue, lead me to regard his evidence with extreme suspicion, and in the end I find myself unable to accept it, even though I realise that the evidence of the railway company is not absolutely conclusive. I think this case illustrates the difference between the evidence in a civil and criminal trial. I could quite understand that it would be impossible to convict Nathanson if he were now standing his trial, because it would well be said that there exists the element of reasonable doubt; but, in this civil case, I think I have to weigh the preponderating probability, having regard to the burden of proof, and I think that this indicates that all the goods received were delivered.

I have not overlooked the fact that the two boards in the car were lost in the railway freight-sheds at Toronto, and I do not include these in anything that I have said.

There must be judgment for the plaintiff for \$3, the value of these boards, with Division Court costs, subject to a set-off.



[MASTEN, J.]

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May 3.

## RALSTON V. TANNER.

*Contract—Purchase of Land by Physician from Patient—Confidential Relationship—Condition of Patient—Lack of Independent Advice—Unfairness of Agreement in some Respects—Gift to Brother—Evidence.*

A medical man is placed in a position of trust and confidence towards his patient which requires from him the same degree of good faith, plain dealing, and guarded conduct which the law requires shall subsist between trustee and *cestui que trust* and in other relations of the same character. The rule stands upon a general principle applicable to all variety of relations in which dominion may be exercised by one person over another. And the principle applies both to gifts or voluntary conveyances and to contracts for valuable consideration, the only difference being that in the case of the latter, where the transaction is manifestly fair, evidence of independent advice may not be necessary.

*Huguenin v. Baseley* (1807), 14 Ves. 273, 291, 292, *Rowe v. Grand Trunk R.W. Co.* (1866), 16 U.C.C.P. 500, 506, *Vanzant v. Coates* (1917), 39 O.L.R. 557, 40 O.L.R. 556, and *Wright v. Carter*, [1903] 1 Ch. 27, 50, 54, 55, followed. Where an elderly man, suffering from an incurable malady, made an agreement with his medical attendant for the sale to him of his house and land, at a price which was considered not an unfair one, and part of the purchase-money was to be paid after the patient's decease to his brother, it was held, considering the relationship of physician and patient, the condition, both mental and physical, of the deceased at the time of the agreement, the absence of independent advice, and the unfairness of the agreement in certain aspects, that the agreement must be set aside as against both the physician and the brother: as against the latter, the case was *stro ger*, for part of the purchase-money was made a gift to him.

ACTION by the only son and sole devisee and legatee under the will of Samuel Archibald Ralston, deceased, to set aside an agreement made by the deceased, during his last illness, with his medical attendant, the defendant Tanner, for the sale to the latter of the deceased's land with the buildings thereon, for \$1,500, part of which, it was agreed, should be paid to the defendant Robert Ralston, the brother of the deceased, and to set aside a conveyance made by the defendant Robert Ralston, as executor of Samuel A. Ralston, to the defendant Tanner, pursuant to the agreement.

April 15. The action was tried by MASTEN, J., without a jury, at Barrie.

W. A. Boys, K.C., for the plaintiff.

M. B. Tudhope, for the defendant Tanner.

The defendant Robert Ralston did not appear.



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May 3. MASTEN, J.:—The defendant Robert Ralston has not appeared in the action, and as against him the pleadings have been noted. He was not represented at the trial. The defendant Effie Hager was joined because she was the holder of a mortgage registered against the land in question. At the trial it appeared that the mortgage held by her had been paid off *pendente lite* by the defendant Tanner and that the action as against her had been discontinued. The trial therefore proceeded as against the defendant Tanner only.

The plaintiff is the only son of one Samuel Archibald Ralston, late of the town of Midland, shoemaker, who died on the 13th August, 1917, at the town of Midland, and was a widower at the time of his death. By his last will, dated the 12th November, 1915, the testator devised and bequeathed all his estate to his son, the plaintiff, subject to the payment of \$200 for the support and advancement of an adopted son, Douglas Ralston, and appointed his brothers, Robert Ralston and Charles Ralston, executors. Charles Ralston renounced his right to probate, and accordingly probate was granted by the Surrogate Court of the County of Simcoe to Robert Ralston, executor of the will.

The plaintiff volunteered at the outbreak of the war in 1914, and in the fall of that year went overseas. From that time, his father lived alone on the property here in question, cooking for himself and taking care of his own house. The relationship between himself and his son had always been of a kindly and affectionate character, and so remained down to the time of the father's death.

Some time in the year 1916, or early in 1917, the testator fell ill, and the defendant Tanner, who is a physician residing and practising at the town of Midland, was called in to attend him. As a result of this illness, one of the testator's feet became gangrenous and was removed by the defendant Tanner, and the patient was supplied with a wooden leg. He recovered from this operation in some four or five weeks. Subsequently, the other foot became gangrenous, and, for a very considerable time prior to his death, he was confined to his bed. The defendant Tanner attended him during this illness and until his death. His condition and the condition of the house at this time were most insanitary; even from the first he was unable to move

about except with great difficulty, and later was wholly confined to his bed. The condition of the house and of the bed is described as most filthy, and the stench such that it was almost impossible to enter the house. For a considerable portion of the time preceding his death, he suffered from diarrhoea.

On or about the 25th January, 1917, the testator entered into an agreement with the defendant Tanner for the sale to him (Tanner) of certain lands and premises then owned by him, being the lands whereon he then resided.

The property consisted of about three and one-quarter acres of land, on which there exists a brick-veneered house with stone foundation, a small barn, and a summer kitchen. The property is situated about  $1\frac{1}{4}$  miles from Midland post-office.

It is unnecessary to refer to the terms of the agreement, except to say that the price paid was to be \$1,500, payable as follows: the sum of \$500 in cash and the balance in monthly payments of \$50 each on the 1st day of each and every month. The agreement also provides as follows:—

“It is understood and agreed between the parties hereto that the said payment of \$50 per month is to be applied in the following manner: the purchaser is to continue to give the vendor medical attention such as he has been doing in the past, and such medical attention is to be computed at \$30 per month; the balance of the said \$50, namely, \$20, is to be applied by the purchaser to the purchase of food, clothing, and other necessities, and furnishing the vendor with such care as he may require, and is to be for the vendor's sole use and benefit. In the event of the death of the vendor, the balance then remaining unpaid is to become due and payable to Robert Ralston, of the city of Montreal, in the Province of Quebec, checker. It is understood and agreed between the parties that no interest is to be charged upon the balance remaining due from time to time. It is further understood and agreed that the vendor is to remain in sole possession and occupancy of the house herein until the expiration of this agreement.”

The purchaser was to pay all taxes and municipal rates from the date of the agreement.

The facts connected with the negotiations and signing of this agreement are as follows:—

Samuel Archibald Ralston had been desirous of selling this property since some time in 1916, or possibly earlier.

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In 1916, he placed it for sale with one Alexander William Bell, a real estate agent in Midland. The price which he then put upon it was \$2,300. Subsequently, he offered it to one Amedeo Podio for \$1,600; Podio offered him \$1,400, but no bargain was made.

The evidence of the defendant Tanner, which is uncontradicted, was that Samuel Archibald Ralston first desired him (Tanner) to buy the property at \$1,500; that at that time the testator owed him a bill of \$80 or over, and that he was desirous of securing payment of that bill, and also of acquiring some property in the neighbourhood; and, having made inquiries as to the value of the property, he subsequently accepted the offer on the terms indicated in the agreement.

At the time when these negotiations were proceeding, Robert Ralston, who resided in Montreal, was visiting his brother, and he was present at some of the negotiations, but, according to the evidence, took no part; Robert Ralston was not examined as a witness. The agreement was prepared by George Samuel Dudley, a solicitor, who received instructions from Robert Ralston and the defendant Tanner. The agreement, when prepared, was taken away by Robert Ralston, and subsequently was brought back for an alteration which appears on the face of the agreement, the word "property" being struck out and the word "house" inserted. This is sworn to as having been done at the request of Samuel Archibald Ralston after he had read over the agreement, he being desirous of making sure that he was entitled to remain in the house notwithstanding the agreement.

The circumstance is only important as indicating his understanding and appreciation to that extent of the terms of the agreement. Dudley never saw Samuel Archibald Ralston, and took no instructions from him. He says that he intended to charge his services for drawing the agreement one-half to Robert Ralston and one-half to the defendant Tanner. The situation in this regard is somewhat confused, because he says that he had actually entered his charge in his books as against Samuel A. Ralston, and he was paid \$2 by Robert Ralston. Samuel Archibald Ralston did not have any independent advice or indeed any advice whatever in regard to the agreement.

After the death of Samuel A. Ralston, Dudley acted as solicitor



for Robert Ralston in connection with the estate of his late brother; and, on the 22nd September, Robert Ralston, as executor, made a deed of the property in question to the defendant Tanner. The deed was drawn by Dudley.

At the date of the agreement, the defendant Tanner paid to Samuel Archibald Ralston \$415, being the amount of the cash payment, less \$85 for medical services then due; and, after the death of Samuel A. Ralston, at the time of the execution of the deed, Tanner paid to Robert Ralston, or to Dudley as his solicitor, \$885, the balance of the purchase-money. The remainder of the \$1,500 consists of the expenditures made by the defendant Tanner for food, clothing, and so forth, and allowance to him for services from the 25th June, covering in full the \$1,500 of the purchase-price.

The plaintiff alleges that, at the time of the agreement above mentioned, the defendant Tanner was and had been for a long time the medical adviser of the said Samuel Archibald Ralston, and that, owing to his diseased condition and to the absence of his only son, the plaintiff, he was unfit and incapable of transacting business; and further that, because of that fact and because of his relationship with the defendant Tanner and Robert Ralston, the agreement for the sale of the land in question and the deed made in pursuance thereof are invalid and should be set aside.

The plaintiff also alleges that the defendant Tanner failed to carry out the covenants in the said agreement contained, and on this ground that the agreement should be rescinded. In the statement of claim it is also alleged that the defendant Ralston has claimed the right to all moneys unpaid under the said agreement from the date of the death of Samuel Archibald Ralston, amounting to \$1,000, and is upholding the said agreement to his own profit, and is not protecting the interests of the estate of the deceased, as he is in duty bound to do.

The relief claimed is: (1) that the alleged agreement should be declared null and void, from its inception, as against the creditors and legatees of the deceased; (2) that the agreement should be rescinded on account of the failure of the defendant Tanner to perform the covenants thereby entered into by him; (3) that the covenants in the deed of conveyance be also declared to be null and void and of no effect.



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The defendant Tanner in answer alleges that the price paid for the land was adequate; that the agreement was in its terms manifestly fair and to the advantage of Samuel Archibald Ralston, having regard to the situation in which he was then placed; and that the agreement has been fully and faithfully performed on his part in all its terms.

With respect to the question of the adequacy of the price, the evidence is conflicting, as is usual in such cases. The witness James Hays places the value of the property as high as \$2,500. The plaintiff values the property at \$2,200 for "spot cash." I prefer, however, the evidence of the witness Alexander William Bell and of the witness Podio. Bell states that, when the property was placed with him by Samuel Archibald Ralston in 1916, he told Ralston that the price named, \$2,300, was too high, and he found himself unable to sell the property at that figure. The evidence of the witness Podio, which is uncontradicted, is that Samuel Archibald Ralston offered the property to him at \$1,600. Bell says that \$1,500 was a fair price for the property. He says he knew the property in question and had walked over and was familiar with it. He says that the condition of the house at the time it was sold would depreciate its value until it had been cleaned out and fixed up, and continues as follows:—

"Q. When you are putting it at \$1,500, to a large extent it is because of that condition? A. Yes.

"Q. The fact of a man being in there who had gangrene and with the smell, you wouldn't get nearly as much for it? A. That is the time it was sold.

"Q. That is why you put it at \$1,500. A. Yes.

"Q. If he had never had gangrene in the house, and it had been kept in a clean condition, you would then agree perhaps with the old man's figure of \$2,000 to \$2,300? A. Yes, \$2,000."

And later in his re-examination he says:—

"Q. Do you think, if you had gone there in the condition my learned friend points out to you, and had paid him \$1,500 for that property, in the condition it was in then, you would have been injuring him in any way? A. No, I don't think.

"Q. Would you have been injuring yourself? A. No.

"Q. You think it would have been a fair bargain? A. Yes. If a person wanted to do business with him.

"Q. What do you mean? A. If anybody wanted the property.

"Q. That would be a fair price between man and man? A. Yes, I do. I think it was every cent it was worth."

Upon the whole of the evidence, I find as a fact that the price of \$1,500 was not unfair *as a cash-price*. With respect to the other contention raised by the defendant, namely, that he has fulfilled the terms of the agreement, I find in his favour. Some criticism was suggested, in the course of the evidence, because he had allowed Samuel Archibald Ralston to remain in his house in the condition in which it was; but I think that, upon all the evidence, it is reasonably plain that Samuel Archibald Ralston had a strong will and mind of his own and declined to be moved from his house, or to permit adequate nursing attendance.

I also find in favour of the defendant that, while Samuel Archibald Ralston was in a weak and miserable physical condition, yet he understood and appreciated that he was selling his homestead and the price at which it was being sold. In that respect I again give credit to the testimony of Alexander William Bell, from which I quote the following extracts:—

"Q. This agreement between Samuel Ralston and Dr. Tanner, was it discussed between you and Ralston? A. Yes, sir.

"Q. Where did this discussion take place? A. At Samuel Ralston's house.

"Q. How did you happen to be there? A. I was over at Mrs. Billings', and on my way back I went over to see Mrs. Pyne. I was selling her some property. I dropped in to see Ralston, which I always did when I was passing. I knew he was sick.

"His Lordship: What is the date of that? A. In the summer of 1917.

"Q. The agreement is the 25th of June?

"Mr. Tudhope: Ralston told you in any event that he had sold the property to Dr. Tanner? A. Yes.

"Q. Did he discuss the agreement with you? A. He did.

"Q. Did he talk over the terms of the agreement with you? A. He did, yes.

"Q. What was his condition of mind at that time? A. At that time his mind was perfectly fit to do business, in my mind, from his conversation with me that day.

"Q. To what extent did he discuss the terms of the agreement with you? A. When I went in the door.

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"Q. To what extent did he discuss the terms of the agreement?

A. He told me that he had sold his property to Dr. Tanner, and he got \$1,500 for it—\$500 cash and \$50 a month until the balance was paid, and if he would die before that period that Robert Ralston, the executor, would get the balance.

"Q. He went over these terms of the sale with you? A. Positively, yes.

"Q. What kind of business man was he generally? A. Any business I had to do with him, he was a shrewd business man.

"Q. Get away from the 'smell' question. I mean to say, if you wanted to buy that property yourself, and he had nobody to help him, he is in bed, just the way you saw him two months before his death—I ask you, as an honest man, if you think you would be doing right if you went there and drove the best bargain you could with that man? A. No, I wouldn't do it."

Other witnesses stated that Samuel Archibald Ralston failed to recognise them; that he was at times somewhat wandering in mind and childish. Nevertheless I am of opinion, upon the whole evidence, that in regard to the agreement in question he understood its general nature and its obvious terms and the price.

Notwithstanding these findings in favour of the defendant, I am clearly of opinion that the agreement and the deed made in pursuance of it are invalid and must be set aside. The relationship of physician and patient existed between the defendant Tanner and Samuel Archibald Ralston at the time when the agreement was made. That relationship had existed between them for a considerable period before, and continued afterwards until the death of the testator. Coupled with this is the fact that the testator had no independent advice, and the fact that, in certain respects hereinafter mentioned, the operation and effect of the agreement were unfair.

The principles upon which the Court acts under these circumstances were long ago established in the leading case of *Huguenin v. Baseley* (1807), 14 Ves. 273, at pp. 291, 292, and they appear to have remained substantially the same down to the present time. They have been incorporated in our jurisprudence, as is shewn by the language of the Court in the case of *Rowe v. Grand Trunk R.W. Co.* (1866), 16 U.C.C.P. 500. At p. 506 Mr. Justice Adam Wilson says:—



"As to the first ground, there can be no doubt that a medical man is placed in such a position of trust and confidence towards his patient, which requires from him the same degree of good faith, plain dealing, and guarded conduct which the law requires shall subsist between trustee and *cestui que trust*, parent and child, guardian and ward, tutor and pupil, minister and member of his congregation, attorney and client, master and servant, and in other relations of the same character. The rule 'stands upon a general principle, applying to all variety of relations in which dominion may be exercised by one person over another.'"

The earlier cases have recently been reviewed in the recent case of *Vanzant v. Coates* (1917), 39 O.L.R. 557, 37 D.L.R. 471, affirmed in appeal 40 O.L.R. 556, 39 D.L.R. 485. In that case the principles to which I have referred are discussed with approval, and two classes of cases are distinguished in which the transaction may be set aside: first, where the Court is satisfied that the transaction was the result of influence expressly used by the grantee for the purpose; second, where the relations between the grantor and grantee are such as to raise the presumption of influence by the grantor over the grantee, and that presumption has not been rebutted.

I think I ought to say that I acquit the defendant Tanner and his solicitor of undue influence or pressure actively or directly exerted on the plaintiff's father. I think they were both entirely oblivious of the special duty which was, in the circumstances, owed to the defendant's patient, and they acted as they would have been entitled to do in the case of an independent and competent stranger.

It is contended, however, by the defendant, that this is a case of purchase by the defendant Tanner, and in that respect differs from a gift; and it is perfectly plain, as was said by Vaughan Williams, L.J., in *Wright v. Carter*, [1903] 1 Ch. 27, at p. 50, "that in the case of a gift the rule applied by the Court of Equity is much more stringent, is more absolute, than the rule that is applied in the case of a bargain or a contract." And it is further said by the same learned Judge at pp. 54 and 55 of the same report: "I am not prepared to lay it down that, in every case of purchase, competent independent advice is necessary as distinguished from the advice of the purchasing solicitor. It may

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be that a particular transaction of purchase appears to be so manifestly fair that independent advice is not necessary."

It is plain, upon the authorities, that the principle under consideration applies both to voluntary conveyances and to contracts for valuable consideration, the only difference being that in the case of the latter, where the transaction is manifestly fair, evidence of independent advice may not be necessary.

In the present case, however, I do not think that the agreement as drawn was manifestly fair. Though the purchase-price may, as I have indicated above, be sufficient, yet I am clearly of opinion that it was what may fairly be characterised as a low or very close price, even if paid in cash. The unfairness of the agreement rests, however, upon other considerations which, I think, were not manifest to the mind of Samuel Archibald Ralston, and in regard to which I think he ought to have had the benefit of independent advice.

In support of this view I refer particularly to three of the points argued by counsel for the plaintiff:—

1. The effect of this agreement is, that Samuel Archibald Ralston tied himself irrevocably to the defendant Tanner as his physician. If the defendant's services were unsatisfactory or were not well rendered, or even if the patient took an imaginary and unwarranted prejudice against the physician, he would have been unable to change his physician except by losing the \$30 per month which he was to receive in services to be rendered to him by the defendant Tanner as his physician.

2. In the second place, if Samuel Archibald Ralston had recovered in four or five months, as the defendant Tanner says he expected him to do, Tanner would have got the property by rendering his services at the rate of \$30 per month for four or five months, and would afterwards have been free from attending daily, as he was expected to do, because Samuel Archibald Ralston would have been well. I think the agreement must be looked at as of the day when it was made, and that in both of these respects it was necessary and important that Samuel Archibald Ralston should have had independent advice, and that these points should have been clearly brought to his attention. That could not have been done except by competent and independent advice.

3. There is also very considerable question upon testimony as

to whether the agreement did in truth fulfill the intention of Samuel Archibald Ralston, where it provides for payment to Robert Ralston of the balance of the purchase-price which might remain unpaid at Samuel's death. The evidence as adduced before me indicates, to my mind, that what Samuel probably thought was that the money would be paid to Robert as executor; and it certainly ought to have been explained to him that, as the agreement was drawn, the money was payable to Robert personally, and not as his executor, and that in so doing he was depriving the plaintiff of the benefits previously given him by the will.

In all these respects I think the absence of independent advice to Samuel Archibald Ralston was important and necessary.

My conclusion is, that, considering the relationship of physician and patient which existed between the defendant Tanner and Samuel A. Ralston; considering his condition, both physical and mental, at the time of the transaction, considering the absence of independent advice and the unfairness of the agreement in the aspects to which I have referred, the defendant Tanner has failed to discharge the onus cast upon him of justifying the transaction.

With respect to the defendant Robert Ralston the case is stronger than as against the defendant Tanner, because with respect to Ralston it was a matter of pure gift, not a purchase.

For these reasons, judgment will go setting aside the agreement and the deed made in pursuance thereof, as against both defendants, with costs.

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[APPELLATE DIVISION.]

May 7.

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*Way—Easement—Right of Way over Adjacent Land—Reservation or Exception in Deed of Conveyance—Construction—Ascertainment of Land to which Easement is Appurtenant—Use of Way in Connection with other Lands of Grantor.*

A., being the owner of a block of land, erected thereon three houses, 24, 26, and 28—24 being the most southerly. Houses 26 and 28 were separated from each other by a strip of land, not built upon, having a width of 8 feet 6 inches and extending westerly from the street upon which the houses fronted. In 1912, A. sold and conveyed 26 to the plaintiffs' predecessors; it stood 2 feet 6 inches south of the northerly limit of the land upon which it was built. A. then owned the land adjacent on the north, on which stood house 28, and also the land adjacent on the west, the two together forming an L-shaped parcel of land. In the conveyance to the plaintiffs' predecessors, after the description, were these words: "Together with a right of way for the purpose only of getting in . . . fuel and for the passage of an automobile over the 6 feet adjoining the premises hereby conveyed to the north to a depth of 76 feet . . . and subject to a right of way for the party of the first part"—A.—"and the owners or occupants of the adjacent premises to the north over the northerly 2 feet 6 inches to a depth of 76 feet . . . ." The grantees did not execute the conveyance:—

*Held* (CLUTE, J., dissenting), that the right of way over the 2 feet 6 inches was, upon the proper construction of the words quoted, limited to the owners or occupants of the adjacent premises to the north, i.e., the parcel on which house 28 stood.

*Per* MULOCK, C.J. Ex.:—A right of way appurtenant must be appurtenant to some particular parcel of land. The way, being appurtenant only to the adjacent premises to the north, could be used for the benefit of those premises only.

*Per* RIDDELL, J.:—There is no such thing as an "easement in gross" in the proper sense of the words; an easement must be appurtenant to some particular piece of land, or to the ownership of a particular piece of land; here the tenement described as "the adjacent premises to the north" was the dominant tenement; and the right of way "excepted" was so excepted for the advantage of the premises known as house 28.

*Per* KELLY, J.:—The language of the instrument itself was conclusive. The words "to the north" limited the easement to the premises No. 28.

*Per* CLUTE, J.:—The case turned upon the construction of the grant, and the construction should be based upon the surrounding circumstances, to shew the meaning of the parties. The conveyance contained a grant of a right of way over 6 feet, and reserved a right of way over 2 feet 6 inches. This created an easement for the benefit of and appurtenant to the whole of the land owned by A.; the words in the deed "and the owners or occupants" were by way of further assurance, and were not intended to limit the right of way to which the conveyance was declared to be subject.

An appeal by the defendant from the judgment of MEREDITH, C.J.C.P., after trial of the action, without a jury, at Toronto, in favour of the plaintiffs, Harry Wilbur Miller and Olive Miller, restraining the defendant from making use of the northerly 2½ feet to the depth of 76 feet of the plaintiffs' land fronting upon Leuty avenue, Toronto, except in connection with the ownership or occupancy of the adjacent premises to the north.



March 28 and April 3. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and KELLY, JJ.

C. J. Holman, K.C., and J. H. Bone, for the appellant. The question for decision turns upon the construction of the grant of a right of way contained in a deed from Herbert J. Atkinson to Julia Ball and the plaintiff Olive Miller, dated the 11th September, 1912. The question to be decided is, whether the appellant is entitled to a right of way appurtenant to not only the land adjacent on the north of the 76-foot strip referred to in the reservation, but also to the other land owned by Atkinson at the time of the giving of the deed, namely, that parcel lying westerly and south-westerly of the plaintiffs' land, on the southerly portion of which are certain garages. We submit that the appellant is entitled to the larger easement: *White v. Grand Hotel Eastbourne Limited*, [1913] 1 Ch. 113; *Grant v. Lerner* (1914), 7 O.W.N. 564; *Dennis v. Wilson* (1871), 107 Mass. 591; *Lathrop v. Elsner* (1892), 93 Mich. 599; *Saylor v. Cooper* (1882), 2 O.R. 398; *Finch v. Great Western R. W. Co.* (1879), 5 Ex. D. 254; *United Land Co. v. Great Eastern R. W. Co.* (1875), L.R. 10 Ch. 586; *Sketchley v. Berger* (1893), 69 L.T.R. 754; *Watts v. Kelson* (1871), L.R. 6 Ch. 166; *Baxendale v. North Lambeth Liberal and Radical Club Limited*, [1902] 2 Ch. 427; *Telfer v. Jacobs* (1888), 16 O.R. 35; Washburn's Easements and Servitudes, 4th ed., p. 35; *White v. Crawford* (1813), 10 Mass. 183; *Briggs v. Semmens* (1890), 19 O.R. 522; *May v. Belleville*, [1905] 2 Ch. 605; *Skull v. Glenister* (1864), 16 C.B.N.S. 81; *Read v. Read* (1866), 15 W.R. 165. The right of way was made "for the party of the first part," and was in respect of all the land, not merely the land to the north of the 76-foot strip.

I. F. Hellmuth, K.C., and Alexander MacGregor, for the plaintiffs, respondents. The right of way is appurtenant only to the premises to the north, as stated in the grant. You cannot separate the words "for the party of the first part" from the rest of the grant. There cannot be a grant of an easement in gross: *Purdum v. Robinson* (1899), 30 S.C.R. 64; *Everett v. Remington*, [1892] 3 Ch. 148. The defendant is not entitled to pass over the premises to the north to and from his westerly premises over the 2½ foot strip: *Purdum v. Robinson*, *supra*.

Holman, in reply.

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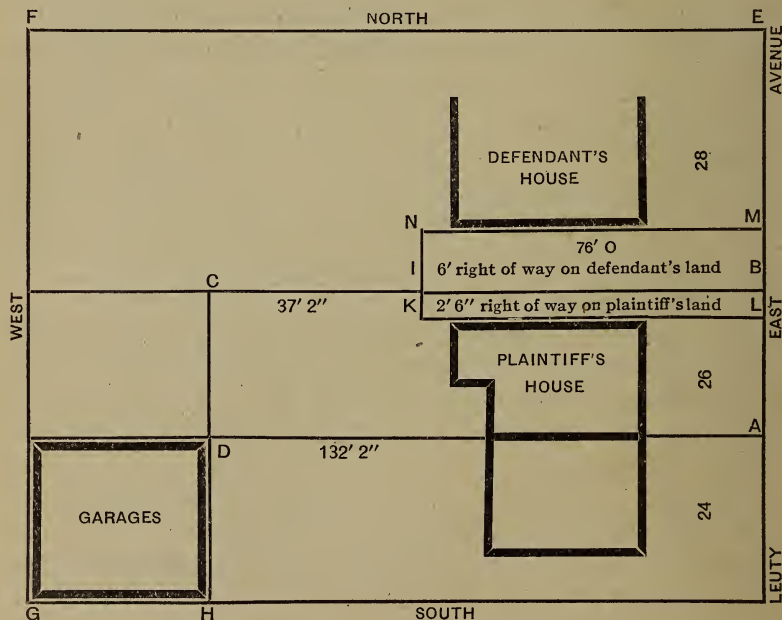
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May 7. MULOCK, C.J.Ex.:—This is an appeal from the judgment of Meredith, C.J.C.P., in favour of the plaintiffs; and the sole question is, whether the defendant is entitled to use or authorise the user of a certain way 2 feet 6 inches wide by a depth of 76 feet, extending westerly from Leuty avenue, in the city of Toronto, as appurtenant to certain of the defendant's lands.

The facts are as follows:—

One Atkinson owned a block of land situate on the west side of Leuty avenue, and erected thereon three houses known as street numbers 24, 26, and 28 respectively, number 24 being the southerly one, then came No. 26 and lastly No. 28. Houses Nos. 26 and 28 were separated from each other by a strip of land, not built upon, having a width of 8 feet 6 inches and extending westerly from Leuty avenue. The two houses were immediately opposite each other and of the same depth from east to west.

On the 11th September, 1912, Atkinson sold and conveyed to the plaintiffs' predecessors in title the land upon which house No. 26 is situate, being the lands included within the letters A, B, C, D, and A, on the following plan:—



House No. 26, now the plaintiffs', stood 2 feet 6 inches south of the northerly limit of the plaintiffs' land. At the time of this sale

and conveyance, Atkinson owned the land adjacent thereto on the north, on which stood house No. 28, and he also owned the land adjacent thereto on the west, the two portions together forming an L-shaped piece of land, being the land included within the letters B, E, F, G, H, C, and B on the plan. After the description of the land contained in the conveyance from Atkinson to the plaintiffs' predecessors in title are these words: "Together with a right of way for the purpose only of getting in coal or other fuel and for the passage of an automobile over the 6 feet adjoining the premises hereby conveyed to the north to a depth of 76 feet from Leuty avenue and subject to a right of way for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 feet 6 inches to a depth of 76 feet from said avenue of the premises hereby conveyed."

This 6-foot right of way is over the defendant's land shewn in the plan as included within the letters B, I, N, M, and B, and the 2-foot 6 inch right of way, being that in question in this action, is over the plaintiffs' land embraced within the letters B, I, K, L, and B. Shortly after the sale of premises No. 26, Atkinson sold the premises No. 24 to a third party; and later, by deed dated the 23rd September, 1915, conveyed to the defendant his remaining two parcels of land, being together the L-shaped parcel above mentioned, and the defendant has erected at the south-westerly end thereof, at the place indicated on the plan, three garages, which he lets to persons for storage therein of automobiles, and he claims for his tenants the right of way over the plaintiffs' strip of 2 feet 6 inches for a distance of 76 feet westerly from Leuty avenue, basing such claim on the above-quoted words contained in the conveyance from Atkinson to the plaintiffs' predecessors in title, which he says created a right of way over the 2 feet 6 inches strip, appurtenant to the premises where the garages now are.

The grantees did not execute the conveyance containing these words.

In *Durham and Sunderland R.W. Co. v. Walker* (1842), 2 Q.B. 940, 967, Tindal, C.J., says:—

"It is to be observed that a right of way cannot, in strictness, be made the subject of an exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a

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reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee."

The grantee of the land in question not having executed the deed, I fail to see how the insertion of the quoted words in that deed created what is described sometimes as a re-grant and sometimes as a covenant. It may be that the grantee might be compelled to carry out the intention of the parties by executing an instrument sufficient to create an express grant. The plaintiffs not pressing the point, I will assume that the instrument created a re-grant of a right of way; and the question is, to what land was such right of way made appurtenant? The defendant contends that the words created a right of way appurtenant not only to the land adjacent on the north to the 76-foot strip, but also to the other lands then owned by Atkinson, namely, that parcel lying westerly and south-westerly of the plaintiffs' land, on the southerly portion of which are the garages in question.

The only dominant tenement referred to in (I shall call it) "the re-grant" is "the adjacent premises to the north" etc.

The defendant's claim must fail unless the re-grant created a right of way appurtenant to the lands lying westerly and southerly of the plaintiffs' land, and which I shall hereafter refer to as the westerly premises. Does it? It is of the very essence of a right of way appurtenant that it be appurtenant to some particular parcel of land. It exists solely for the benefit of that land and has no separate existence. Unless appurtenant to a definite piece of land, there is no easement.

As a matter of correct conveyancing, the dominant tenement should be named in the grant of an easement appurtenant, and its omission in the present case is significant.

In the 5th volume of the *Encyclopædia of Forms and Precedents*, p. 500, the learned editor says: "In every grant of an easement of way the *termini à quo* and *ad quem* should be clearly defined;" and in *Brickdale & Sheldon's work on the Land Transfer Acts*, 2nd ed., p. 590, is given a form approved by the Registrar under that Act, indicating his opinion that it is essential to the creation of a right of way appurtenant to a piece of land, that the instrument should define the dominant and servient tenements.



I have examined the forms of grants of right of way appurtenant, given in many of the recognised standard books of precedents, and have failed to observe a single form which does not provide for the *termini à quo* and *ad quem* appearing in the instrument.

The re-grant here makes no reference to the westerly premises, and the conclusion must be that it was not intended to create a right of way appurtenant thereto—a view which, if correct, is fatal to the defendant's contention. That the parties did not contemplate a re-grant applying to the westerly premises is suggested by many circumstances.

Atkinson owned the 6-foot strip extending from Leuty avenue westerly and lying immediately to the north of the 2 feet 6 inches strip. By his deed of the 12th September, 1912, he conveyed to the plaintiffs' predecessors in title the land extending westerly from Leuty avenue a distance of 113 feet 2 inches; but that same deed provided that the 8 feet 6 inches strip (composed of the 6 feet and the 2 feet 6 inches strips) should extend only 76 feet westerly. If it had been intended to create a right of way appurtenant to the westerly premises over the plaintiffs' land, the obvious course would have been not to stop the right of way at the 76 feet point, but at the westerly limit of the plaintiffs' land. Stopping where it did, at a point a few feet west of the west side of both houses, suggests that it was made to run past the houses just far enough to enable vehicles to turn around, thus indicating that it was created for the benefit of premises Nos. 26 and 28 only.

Further, Atkinson, though examined as a witness, does not say that it was intended or contemplated that he, *quâ* owner of the westerly premises, should have any rights over the 2 feet 6 inches strip.

Further, Atkinson owned the 6-foot strip of the land beyond the 76-foot point, and it furnished to him means of ingress and egress in respect of his westerly premises.

Further, the re-grant defining only "the premises adjacent to the north," etc., goes to shew that the parties had those lands in their minds as the only ones to which the right of way should be appurtenant. *Expressum facit cessare tacitum.*

These circumstances, I think, indicate that the parties did not contemplate a right of way over the two feet six inches strip

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as appurtenant to the westerly premises, but it remains necessary to deal with the contention of the defendant that, according to the strict reading of the re-grant, he is entitled to such right. The argument is that the words "subject to a right of way for the party of the first part" are to be read apart from those that follow. Even if that were so, those words apply to Atkinson only, and this defendant takes nothing under them. But we are asked to make them include the defendant, and to that end to make a new contract for the parties to the re-grant, by reading into it terms creating a right of way appurtenant to the westerly lands. Such is not the privilege of the Court.

I am, however, unable to accept the defendant's construction of the meaning of the re-grant, and am of opinion that it must be read as a whole, and that the words which follow, namely, "and the owners or occupants of the adjacent premises to the north," qualify all the preceding words, and that its legal effect is to limit the right of way to Atkinson and other owners or occupants of the adjacent premises to the north.

If the words in the reservation of the right of way had omitted the words "to the north," leaving it to read "subject to a right of way for the party of the first part and the owners or occupants of the adjacent premises," Atkinson (who was at the time the owner thereof) would have been included in the word "owners," and the easement would have become appurtenant to all of his adjacent premises, namely, those to the west as well as those to the north; and, if such had been the intention of the parties, it would have been accomplished by the omission of the words "to the north." Then why were those words added? Clearly, I think, to limit the right of way to the premises to the north. No other reason, I think, can be assigned.

Further, if, without the words "to the north," Atkinson, the party of the first part, is included in the word "owners," the addition of the words "to the north" cannot reduce the scope of the word "owners" by excluding him therefrom; and, therefore, the reservation must be read as creating a right of way appurtenant to the premises to the north only.

Whilst there is not a strict grammatical connection between the words "party of the first part" and the words "adjacent premises," etc., the controlling idea is that of a right of way appur-

tenant to those premises available to their owners or occupants, one of whom was Atkinson, and the defining of those premises only excludes any other premises from the scope of the re-grant.

A further argument is, that the defendant, having the right to use the way in question in respect of his adjacent premises to the north, is entitled to pass over those premises to and from his westerly premises, and for such purpose to use the 2-foot 6-inch way. That way, being appurtenant only to the defendant's adjacent premises to the north, can be used for the benefit of those premises only. Such is the measure of the defendant's rights, and user in excess of those rights is trespass.

The law is well-established that a right of way appurtenant to a particular close must not be used colourably for the real purpose of reaching a different adjoining close. This does not mean that where the way has been used in accordance with the terms of the grant for the benefit of the land to which it is appurtenant, the party having thus used it must retrace his steps. Having lawfully reached the dominant tenement, he may proceed therefrom to adjoining premises to which the way is not appurtenant; but, if his object is merely to pass over the dominant tenement in order to reach other premises, that would be an unlawful user of the way: *Skull v. Glenister*, 16 C.B.N.S. 81; *Finch v. Great Western R.W. Co.*, 5 Ex. D. 254; *Telfer v. Jacobs*, 16 O.R. 35; *Harris v. Flower & Sons Limited*, [1904] W.N. 106, 180; *Purdom v. Robinson*, 30 S.C.R. 64, 71; *Ackroyd v. Smith* (1850), 10 C.B. 164.

In the present case the defendant claims the right to use the way in question for the benefit of his westerly premises, or to use it as a way to the adjacent premises to the north, for the purpose of thereby reaching his westerly premises. I am of the opinion that he is not entitled to either of such users, and that the learned trial Judge rightly decided the case, and that this appeal should be dismissed with costs.

RIDDELL, J.:—One Atkinson, a builder, was the owner of a block of land on the west side of Leuty avenue, Toronto, divided into three lots, Nos. 24, 26, and 28, numbering from the south. He built two semi-detached houses on lots 24 and 26; he also built a house on lot 28, in which he lived; to make room for the semi-detached houses, he moved back (i.e., west) a house theretofore

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there standing, moving it behind Nos. 24 and 26 (not 28); he then used this as a tool-house.

He sold lot 24, on the 9th September, 1912, to Verner; and lot 26, on the 11th September, 1912, to the plaintiffs; on the 9th January, 1913, he mortgaged lot 28 to the defendant.

There is a strip of land to the rear of each of these lots, which was not covered by the deeds; recently Atkinson, apparently in consideration of release from his covenants in the mortgage, conveyed to the plaintiffs lot 28 and also the land to the rear of lots 24, 26, and 28—this land has never been fenced off from lot 28. The defendant has recently erected a garage at the south end of the land behind lot 24; and rented space in it to various persons (see the plan attached).

In the conveyance to the plaintiffs there is a grant of a right of way on the south side of lot 28, running for a distance of 73 feet west from the west line of Leuty avenue, the front of the lot; and the grant of lot 26 by metes and bounds is expressly "subject to a right of way for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 feet 6 inches to a depth of 76 feet from said avenue. . . ." The defendant claims to have the right under this reservation to empower those who use his garage to use the right of way over this strip.

Automobiles have used this right of way with considerable frequency, to the annoyance of the plaintiffs; this action was brought for an injunction and damages. At the trial judgment was given for the plaintiffs, and the defendant now appeals.

Some troublesome questions as to parties etc. are avoided by the plaintiffs abandoning the nominal damages given and the injunction awarded, and confining their claim to a declaration of rights—the sole question, then, is the interpretation of the clause set out above.

In this Province we are governed in real estate matters by the law of England—except as it may have been modified by statute—the law of England having been introduced by the first chapter of the first statute of the first Parliament of the new Province in 1792. While in practice the law is as it is shewn by the existing decisions, the theory is that the Courts may be mistaken, and the law which all the time existed is shewn by the later decisions, not that the law has been altered by late decisions.



We must therefore find not what the authorities in and before 1792 said the law was, but what the latest authorities shew it to have been. It has been said that the law of land in countries under the Common Law of England is a "rubbish-heap which has been accumulating for hundreds of years, and . . . is . . . based upon feudal doctrines which no one (except professors in law schools) understands"—and rather with the implication that even the professors do not thoroughly understand them or all understand them the same way.

However that may be, it seems that, while a grant of a right of way can be given to a person "in gross," such a grant is a mere personal contract, and gives no estate or interest in the land itself—the tenement is not servient.

If then the reservation or exception could be considered personal to Atkinson, it would give no right to any control of the land, and Atkinson could not convey the right he had.

The plaintiffs must claim by way of easement or not at all.

It is now definitely settled that there is no such thing as an easement in gross in the proper sense of the words : Halsbury's Laws of England, vol. 11, pp. 235, 236, para. 471, citing *Rangeley v. Midland R.W. Co.* (1868), L.R. 3 Ch. 306, per Lord Cairns, L.J., at p. 311; *Hawkins v. Rutter*, [1892] 1 Q.B. 668, per Lord Coleridge, C.J., at p. 671; *Ackroyd v. Smith*, 10 C.B. 164, per Cresswell, J., at p. 188; notwithstanding such cases as *Great Western R.W. Co. v. Swindon and Cheltenham Extension R.W. Co.* (1882), 22 Ch. D. 677, 706, 707 (C.A.); *Bailey v. Stephens* (1862), 12 C.B.N.S. 91, per Willes, J., at p. 111—to these I add *David Allen & Sons Billposting Limited v. King*, [1915] 2 I.R. 448 (affirmed in Dom. Proc., *sub nom. King v. David Allen & Sons Billposting Limited*, [1916] 2 A.C. 54), where an interesting and valuable discussion by Ronan, L.J., will be found, pp. 463 *sqq.*

The grantee of an easement must, at the time of the creation of the easement, have an estate in the tenement to which the easement is to be appurtenant: *Rymer v. McIlroy*, [1897] 1 Ch. 528; Halsbury, vol. 11, p. 246, para. 497. It is also now clear that, properly speaking, there can be no easement the subject-matter of an exception; but where the instrument conveying the servient tenement purports to reserve an easement (or as here to except an easement) in favour of the owner of the dominant tenement, the

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true effect is to create an easement in favour of the latter by a new grant of the right to the grantor of the servient tenement by the grantee: *London Corporation v. Riggs* (1880), 13 Ch. D. 798; *Dynevor v. Tennant* (1886), 33 Ch. D. 420 (affirmed in Dom. Proc. (1888), 13 App. Cas. 279); Halsbury, vol. 11, p. 249, para. 501. The difference between a reservation and an exception, which is fully explained by Lord Watson in *Cooper v. Stuart* (1889), 14 App. Cas. 286, at p. 289, and by Swinfen Eady, J., in *South Eastern R.W. Co. v. Associated Portland Cement Manufacturers* (1900) *Limited*, [1910] 1 Ch. 12, at p. 22, is here immaterial. See also articles in 27 Law Quarterly Review 150 and in 32 Law Quarterly Review 70.

We must then read this "exception" as though there had been a deed in fee to the plaintiffs and a grant by the plaintiffs in the words of the exception in a deed having the plaintiffs as grantors and Atkinson as grantee. As an easement is never in gross, it must be appurtenant to some particular piece of land (or, as it is sometimes put, appurtenant to the ownership of a particular piece of land), and of course passes with the land without express mention: Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 15; Short Forms of Conveyances Act, R.S.O. 1914, ch. 115, sched. B. 2, 3 (this was so even at the common law: Co. Litt. 121 b; Shep. Touch. 89)—the defendant then has all the rights which Atkinson had at the time of the deed in question, the 11th September, 1912—I am unable to read the exception as a double grant (1) to the grantor in the deed, and (2) to the owners or occupants of the adjacent premises to the north, i.e., as a grant to Atkinson of a right of way appurtenant to some other or some additional land and to the owners or occupants of this particular piece of land.

It seems to me that the dominant tenement described, i.e., "the adjacent premises to the north," is the dominant tenement to which this right of way is appurtenant, and that the right of way is appurtenant to the ownership (using the word in a large sense) of that land. There is a particular piece of land which is accurately described as "adjacent premises to the north" of the land conveyed by the deed to the plaintiffs—no doubt, "adjacent" is not a word to which a precise and uniform meaning is attached by ordinary usage:" *Mayor of Wellington v. Mayor of Lower Hutt*, [1904] A.C. 773, at p. 775; but the word connotes, both etymo-

logically and in ordinary use, a "lying beside." Lot 28 lies beside lot 26 to the north, and it is literally the "adjacent premises to the north" of it.

One canon of interpretation of deeds and other contracts is that, if an object can be found exactly fulfilling the description, the words being used in their ordinary signification, that is taken as the object meant by the contract, unless there is something in the contract or the circumstances indicating some other object—here I find nothing in the circumstances or the contract of such a kind.

We have three houses built by the same person on land owned by him, two sold and one retained—to the two houses sold a certain depth of land is attached by Atkinson. Why should any one think that he intended to act differently by the third retained by him? Moreover, in the very deed in question there is attached to lot 26 a similar easement over lot 28—wider indeed but the same length. Why should the owner of lot 26 imagine he was giving to the owner of lot 28 a greater right than he was receiving?

It seems to me that the right of way "excepted" was so excepted for the advantage of lot 28, and that only—and that no one not in privity with the owner (using the word in the large sense) of lot 28 can use the way—and it can be used only in connection with the use or enjoyment of lot 28.

The use of the garage to the rear of lot 24 is entirely unconnected with the use or enjoyment of lot 28—*Ackroyd v. Smith*, 10 C.B. 164—and the use of the way for the purposes of the use of the garage is wholly unjustified by the deed.

The short user of the tool-house by Atkinson is not sufficient to give any right of way by prescription.

I am not to be considered as holding that the right of way in question cannot be used at all in connection with the back premises; there may be a use of this land which is merely for the beneficial enjoyment of lot 28 (probably the use of the tool-house was such). I do not decide anything in respect of premises so used: the only matter which is under consideration and which this judgment covers is the use for a garage which has no relation with the beneficial enjoyment of lot 28.

With the modification mentioned, this appeal should be dismissed with costs.

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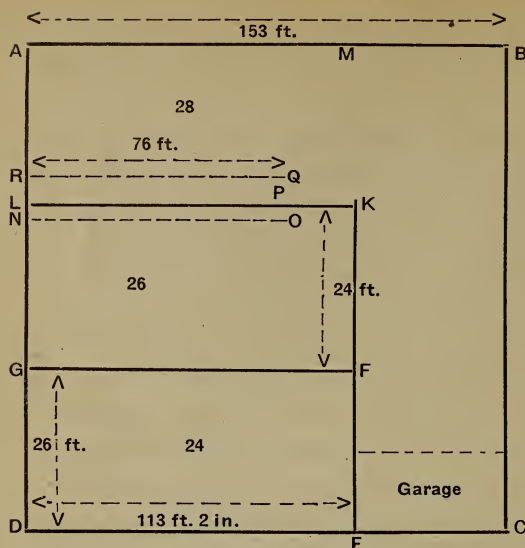
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A.B.C.D. Atkinson's Land.  
D.E.F.G. sold to Verner.  
F.G.H.I. sold to plaintiffs.  
A.B.C.E.K.L.A. conveyed to defendant.  
L.N.=O.P. 2 ft. 6 in.  
R.L.=Q.P. 6 ft.  
R.Q.=N.O.=L.P. 76 ft.  
A.B.=C.D. 153 ft.  
L.K.=G.F.=D.E. 113 ft. 2 in.  
L.N.O.P. the way in question.

KELLY, J.:—I agree with the judgment of my Lord the Chief Justice. I desire, however, to add this. Assuming for the purposes of argument that a right of way was created over the strip of 2 feet and 6 inches by the deed from Atkinson of premises No. 26, the question arises, did that right become appurtenant to all the land which Atkinson retained or only to a part of it, and, if so, to what part?

In my opinion, that question may be determined on the construction of the document itself, following the recognised rules of construction, that an agreement ought to receive that construction which will best fit the intention of the parties to be collected from the whole of the agreement, and that contracting parties are to be taken to have meant precisely what they have said unless from the whole tenor of the instrument a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would convey.

If the intention of the parties that the right over this 2 feet 6 inches should be appurtenant to all the remaining lands—not merely the lands comprising premises No. 28 but the lands on which are now the garages as well—then there could have been no purpose in introducing into the description the superfluous qualifying words “to the north.” If, on the other hand, their intention was to limit the use of the right of way to the premises No. 28

and so exclude from its use the lands to the rear of premises Nos. 24 and 26, the language used is apt and proper to effect that object. If the contracting parties meant otherwise, then why were the qualifying words introduced? To my mind, the language is of itself conclusive; and from the tenor of the whole instrument a broader interpretation than their literal meaning conveys cannot be put upon the words used. Not only is this so, but there appears from the evidence a number of circumstances from which an inference can readily be drawn that the contracting parties must have intended that the language should be restricted to its literal meaning.

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CLUTE, J., (dissenting):—Appeal from the judgment of the Chief Justice of the Common Pleas, restraining the defendant from making use of the northerly  $2\frac{1}{2}$  feet to the depth of 76 feet of the plaintiffs' lands, except in connection with the ownership or occupancy of the adjacent premises to the north thereof, and particularly from letting the same for a garage.

The question for decision turns upon the construction of the grant of a right of way contained in a deed from Herbert J. Atkinson to Julia Ball and the plaintiff, Olive Miller, dated the 11th September, 1912. I have used the plan (exhibit 5) annexed to the abstract as being more accurate.

The facts are as follows:—

One Atkinson owned a small parcel of land on the west side of Leuty avenue, Toronto, consisting of the south 40 feet of lot 16 and the whole of lot 17, containing about one-third of an acre, with a frontage on Leuty avenue of 90 feet by a depth of 153 feet. Upon this land he erected, on the southerly portion, two semi-detached houses, and a single house on the northerly portion. On the 9th September, 1912, he sold the south house, with a frontage of 26 feet and a depth of 113 feet 2 inches, to one Verner, being house No. 24; and on the 11th September, 1912, he sold the house adjoining, with a 24 feet frontage and also a depth of 113 feet 2 inches, to Julia Ball and the plaintiff Olive Miller, being house No. 26, "together with a right of way for the purpose only of getting in coal or other fuel and for the passage of an automobile over the 6 feet adjoining the premises hereby conveyed to the north to a depth of 76 feet from Leuty avenue and subject to a right of way

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for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 feet 6 inches to a depth of 76 feet from said avenue of the premises hereby conveyed."

On the 23rd September, the said Atkinson conveyed the remaining portions of the said parcel above described, to the defendant Tipling, containing about one-sixth of an acre, being house No. 28. This L-shaped piece of land contains a frontage upon Leuty avenue of 30 feet with a depth of 153 feet, and includes the L-shaped piece of land not conveyed to Verner and the plaintiffs.

The deeds both to the plaintiffs and the defendant are made in pursuance of the Short Forms of Conveyances Act. The deed in each case is signed by the grantor, but not by the grantee in either case. The part of lots Nos. 16 and 17 not sold to Verner and the plaintiffs, remained in Atkinson. There was a tool-house upon what has been called the "L-portion" in rear of the lots conveyed to the plaintiffs. The defendant has erected a garage on that portion of the "L" in rear of the land conveyed to Verner.

The plaintiffs claim that the defendant is entitled only to a right of way to the premises to the north of the plaintiffs' land, and not to that portion forming the "L" in rear of Verner and the plaintiffs' land. The defendant claims that he has a right of way to the remaining portions of parts of lots 16 and 17 owned by him and not conveyed to Verner and the plaintiffs.

The question is one of construction, having regard to the deed as a whole; and the surrounding circumstances may be taken into consideration to determine the intention of the parties: *Goddard's Law of Easements*, 7th ed., p. 407; *Cannon v. Villars* (1878), 8 Ch. D. 415; and other cases there cited.

It will be seen that the grant to the plaintiffs of the 6 feet purports to be "adjoining the premises hereby conveyed to the north," the implication being that the grantor owns the premises to the north, over which this limited right of way is granted.

It is said in *Durham and Sunderland R.W. Co. v. Walker*, 2 Q.B. 940, 967, that an easement cannot strictly be made the subject either of exception or reservation, but the reservation or exception operates as a grant of a newly created easement by the grantee of the land to the grantor, and in that case it was said that the deed must be signed by the grantor; but in *May v. Belleville*, [1905]



2 Ch. 605, it was held that the reservation may be such that a grant of the easement by the purchaser is to be implied and will be carried into effect: Goddard, 7th ed., pp. 157, 158; Gale on Easements, 9th ed., p. 78.

In the present case I am of opinion that, having regard to the form of the grant and reservation giving the right of way over the 6 feet, and reserving the right of way over the  $2\frac{1}{2}$  feet, there is an implied grant sufficient to support the right of way to the  $2\frac{1}{2}$  feet.

An easement must be connected with the enjoyment of the dominant tenement: Gale on Easements, pp. 17, 18; *Ackroyd v. Smith*, 10 C.B. 164. In that case the right of way was granted *for all purposes*, whether connected with the user of the land or not, and an attempt had been made to create an easement in gross and to assign it. The case is discussed in Goddard's Laws of Easements, 7th ed., pp. 14, 15. It was held, on demurrer, that a right unconnected with the enjoyment or occupation of land cannot be annexed as an incident to it, and that an easement appendant to a house or land cannot be granted away and made a right in gross.

Counsel did not cite, and I have been unable to find to the present, an express authority, either in England or here, deciding that where the grant is "for the party of the first part" (leaving out the remainder of the clause for the present) it is valid to create an easement in respect of lands adjoining the servient tenement, though not described. There are certain American cases which so hold.

In *Lathrop v. Elsner*, 93 Mich. 599, the right was claimed through mesne conveyance from one King. King was the owner of 50 acres of land, the title to 25 of which now vested in the plaintiff. The remaining 25 was in the defendant, subject to the alleged easement. By the deed there in question, the 25 acres abutting upon the highway were conveyed, King retaining 25 acres in the rear, and the deed contained the language following after the description of the property, "reserving from said grant a perpetual right of way for a private way through on the south side of said lot." The Court held that the view taken by the trial Judge, that the roadway was in gross and not appurtenant to the land retained by the grantor, should not prevail, and it was held that the words created an easement appurtenant to the excepted land, which should pass by the conveyance, and was not personal to the grantor.

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In *Dennis v. Wilson*, 107 Mass. 591, the facts are very like the present. The owner of a lot of land adjoining a highway sold and conveyed part of it, excepting and reserving, without any words of inheritance, a right of way extending over the highway along the line of division between the part sold and the rest of the land, for a distance less than the whole depth of the lot. Held, that the right was appurtenant to the rest of the land, whether or not it was limited to the grantor's life. In that case both derived title from one Jenkins. "Being owner of the whole tract, Jenkins conveyed the south part, which is now the defendant's, 'excepting and reserving a right of way to pass and repass over said land, with teams and otherwise, on the northerly side of said premises, not exceeding 8 rods from said old Worcester road.'" At the trial the Judge ruled that this right of way was appurtenant to the remaining lands of Jenkins, and passed with the land to the plaintiff. That was the question before the Court. Wells, J., in giving judgment, said (p. 592): "In this case, Jenkins conveyed to Rice part of his entire tract of land. The right of way, excepted and reserved, extended from the highway in front, along the line of division, for a specified distance, less than the whole depth of the lots. As the grantor could have no occasion, apparently, to use such a way for any other purpose than for access to and egress from his remaining land, the inference would seem to be inevitable that it was for that use that both parties must have understood and intended the way to be held."

That applies, in my opinion, with full force to the present case. The defendant's predecessors in title owned the adjoining land. Having regard to the facts in this case, of what that land was, both parties must have understood the position perfectly, and it appears to me that the natural inference is that the reservation of the right of way was to the land unsold, owned by the grantor; and, this being so, when a reservation was made "to the party of the first part," that was a reservation of the right of way to all of the land adjoining owned by him, including the "L." The subsequent words were not intended to cut down this reservation, but to make it clear that, in case he sold or rented the property immediately to the north, the owners or occupants would also be entitled to the right of way.

It was also contended in the *Dennis* case that the want of words of limitation to heirs and assigns not only limited the right to

the life of the party to whom the reservation was made, but made it personal to him; but it was held that the right was appurtenant to the land. In the present case I think it clear that the easement, being appurtenant to the land, would pass by a grant of the land from Atkinson to the defendant, and the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 5, sub-secs. 2 and 3, and sec. 15, applies.

It is clear, I think, from the authorities, that if the defendant has a right of way over his lands, including the "L," the change in the method of using the land for a workshop and a garage would not deprive him of this right of way.

*Allan v. Gomme* (1840), 11 A. & E. 759, has often been quoted to support the view that the right to use the way is confined to the use of it to the dominant tenement in the condition in which the said tenement was at the time of the grant. The rule, however, has been laid down differently in different cases.

In *Finch v. Great Western R.W. Co.*, 5 Ex. D. 254, the Court was of opinion that *Allan v. Gomme* established no general rule, but turned on the construction of the particular deed referred to, and that the principle is established, that "where there is an express grant of a private right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant."

In *White v. Grand Hotel Eastbourne Limited*, [1913] 1 Ch. 113, 114, 116 (in appeal to the House of Lords, *Grand Hotel Eastbourne Limited v. White* (1913), 110 L.T.R. 209), where the dominant tenement had been converted from a private dwelling-house to an hotel, the Court seemed unwilling to treat *Allan v. Gomme* as a binding authority and accepted the law as laid down in *Finch v. Great Western R.W. Co.*

See also Gale on Easements, 9th ed., pp. 328-330, where these and other authorities are considered; and *Harris v. Flower & Sons Limited* (1904), 90 L.T.R. 669, [1904] W.N. 106, where the building used was partly on adjoining lands. This decision was reversed in appeal. Their Lordships observed that there was no dispute as to the law. The question was, what was the true inference from the undisputed facts? In their opinion, the true inference was, that the defendant was intending to make an excessive user of the right of way: [1904] W.N. 180, 91 L.T.R. 816.

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In *Telfer v. Jacobs*, 16 O.R. 35, it is held that, where a right of way is granted as appurtenant to certain land, there is a right of unrestricted user of the way in connection with the beneficial enjoyment of the premises to which it is appurtenant, by every part owner of the property, but such part ownership confers no right further to burden the land over which the way exists by using it in connection with other adjoining property to which the privilege is not annexed.

See *Wood v. Saunders* (1875), L.R. 10 Ch. 582; see also *Keith v. Twentieth Century Club Limited* (1904), 90 L.T.R. 775, where it was held that, as the relation of the members of the club was that of customers, and not sublessees, tenants, or friends, upon the true construction of the deed the company could not authorise such user.

In the present case the stalls of the garage were each separately leased. The occupants were in fact tenants, and the case would be no different from that where an owner of land, having a right of way thereto, built cottages thereon, in which case each tenant would have a right to use the way to the cottage leased by him.

In Washburn's *Easements and Servitudes*, 4th ed., p. 35, it is said that, "where one granted land to another, which adjoined other lands which belonged to him, and reserved in his deed a right of way across the parcel granted, in favour of his other lands, and at the same time gave to the parcel granted a right of way across these other lands of the grantor, it was held that he thereby created rights of way appurtenant to both the parcels, which passed with these parcels in the subsequent conveyances thereof, whether mentioned or not in the deed as existing easements;" citing *Brown v. Thissell* (1850), 6 Cush. (60 Mass.) 254.

The burden of a right of way must not be increased: a right of way to or from Blackacre does not include a right of way to or from a place beyond Blackacre: Gale on *Easements*, 9th ed., p. 333; *Colchester v. Roberts* (1839), 4 M. & W. 769, 774; *Skull v. Glenister*, 16 C.B.N.S. 81.

A right of way does not extend to lands subsequently purchased: Gale, p. 333; and *Purdum v. Robinson*, 30 S.C.R. 64, where it was held that a right of way granted as an easement incidental to specified property cannot be used by the grantee for the same purpose in respect to any other property.

After the best consideration I can give to this case and a careful reading of the authorities cited, and many others, my opinion is that the case turns upon the construction of the grant, and that construction should be based upon the surrounding circumstances, to shew the meaning of the parties. The deed in question contained a grant of the right of way over 6 feet, and reserved the right of way to the defendant's predecessor in title over  $2\frac{1}{2}$  feet. I am of opinion that this created an easement for the benefit of and appurtenant to the whole of the land owned by the grantor Atkinson, and that this right to such easement passed to the defendant as appurtenant to the land, and also by virtue of the statute; that the use of the right of way extended to the southerly portion and garage, and was within the defendant's right as appurtenant to the land; and that the words in the deed "and to the owners or occupiers thereof" were by way of further assurance, and were not intended to limit the right of way expressly given to the grantor.

I would allow the appeal. The defendant is entitled to use the right of way as appurtenant to the whole of the lands still remaining in Atkinson upon his sale to the defendant, and such right passed to the defendant. The defendant should have the costs below, and of this appeal.

*Appeal dismissed; CLUTE, J., dissenting.*

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[APPELLATE DIVISION.]

May 8.

ATTORNEY-GENERAL FOR ONTARIO V. RAILWAY PASSENGERS  
ASSURANCE CO.

*Company—Insolvency of Trust Company Incorporated by Dominion Authority—Winding-up—Company Licensed to Do Business in Ontario—Loan and Trust Corporations Act—Application to Dominion Company—Powers of Provincial Legislature—Question not Open in Action on Bond—Election of Trust Company to Give Bond as Term of Receiving License—Liability of Sureties—Extent of—Damages—Lien—Subrogation.*

A trust company incorporated by Dominion authority applied under the Loan and Trust Corporations Act of Ontario, R.S.O. 1914, ch. 184, for registry in Ontario, and, as a term of receiving a license to do business, was required to furnish a bond for the due performance of the duties of any office to which it might be appointed under the terms of its charter and the license granted. The trust company procured the defendants to give a bond, in favour of the Attorney-General for Ontario, in trust for all persons who should become creditors of the trust company by reason of any business done in Ontario. The trust company was appointed executor of a will, and undertook the administration of the testator's estate in Ontario; in dealing with that estate, it paid capital money to two beneficiaries who were entitled to income only. The trust company became insolvent and was ordered to be wound up. The liquidator obtained from the Court an order relieving the company from the executorship and for the passing of the accounts. Upon a reference, the trust company was found liable for the amounts improperly advanced, and was declared entitled to a lien upon the accruing income of the beneficiaries. This action having been brought upon the bond:—

*Held*, that neither the trust company nor its sureties could question the constitutional validity of the Act under which the bond was demanded and given.

Judgment of LATCHFORD, J., 41 O.L.R. 234, upon this branch of the case, affirmed.

*Held*, also, that the sureties were not liable for any greater sum than the principal debtor; and the amount of damages assessed by LATCHFORD, J., was reduced to the amount for which the trust company was liable in respect of the advances made to the beneficiaries—the sureties, defendants, becoming subrogated to the lien upon the accruing income.

AN appeal by the defendants from the judgment of LATCHFORD, J., 41 O.L.R. 234.

March 25. The appeal was heard by MULOCK, C.J. EX., CLUTE, MIDDLETON, and KELLY, JJ.

W. N. Tilley, K.C., for the appellants, contended that the provisions of the Loan and Trust Corporations Act, under which the bond was demanded and given, were *ultra vires* of the Province, so far as it was sought to apply them to a Dominion company. The words "on such terms and conditions as he may prescribe," in clause (b) of sec. 122 (1) of the Act, interfered with Dominion legislation: *John Deere Plow Co. Limited v. Wharton*, [1915] A.C.



330, at pp. 340, 341, 18 D.L.R. 353, at p. 362. If this provision were *intra vires*, it would enable the Province to neutralise Dominion legislation: *Yorkshire Railway Wagon Co. v. Maclure* (1881-2), 19 Ch. D. 478, 21 Ch. D. 309. In any event, the amount of the judgment should be reduced, as it gave, by way of assessment, damages in excess of the liability of the trust company in respect of the advances.

*H. T. Beck*, for the plaintiff, respondent, contended that the legislation questioned was *intra vires* the Province: *Colonial Building and Investment Association v. Attorney-General of Quebec* (1883), 9 App. Cas. 157; *Currie v. Harris Lithographing Co. Limited* (1917), 41 O.L.R. 475. At any rate, the trust company having received its license upon giving the bond, neither the company nor its sureties could be permitted to open up the question of the Province's jurisdiction. In respect to amount, the judgment appealed from is correct: *Palmer v. Jones* (1901), 2 O.L.R. 632; *Wood v. Grand Valley R.W. Co.* (1913), 30 O.L.R. 44.

*Tilley*, in reply.

May 8. The judgment of the Court was read by MIDDLETON, J.:—This is an appeal by the defendants from a judgment of Mr. Justice Latchford of the 8th December, 1917, by which he directed judgment to be entered for \$100,000 upon a bond entered into by the defendants as sureties for the Dominion Trust Company, upon the application of that company to be admitted to registry upon the trust companies' register, under the Loan and Trust Corporations Act of Ontario, R.S.O. 1914, ch. 184.

Under the bond, the defendants became sureties for the due performance by the Dominion Trust Company of the duties of any office to which it might be appointed under the terms of its charter and the license granted.

The bond was made in favour of the plaintiff, in trust for all persons who should become creditors of the trust company by reason of any business done in Ontario.

On the 14th June, 1914, letters probate were granted to the trust company and R. M. Dennistoun as executors of the late Geoffrey Strange Beck.

The Dominion Trust Company became insolvent, and on the 9th November, 1914, it was ordered to be wound up under the Dominion Winding-up Act.

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On the 20th February, 1915, the liquidator of the company applied to the Supreme Court of Ontario for an order relieving it from the duties of office of executor under the will and for the passing of the accounts, and the Toronto General Trusts Corporation was appointed trustee in its stead, and it was referred to the Master to take accounts etc.

As the result of this reference and certain appeals, it was finally held that advances had been made of capital money of the estate in question to two ladies, Helen and Doris Beck, who were entitled only to income, to the amount of \$2,200.89 each. Helen Beck was entitled to other money to the amount of \$2,107.85, which, being set off, left a balance of \$93.04 due by her. Doris Beck was entitled to set off \$253.55, leaving a balance due by her of \$2,064.

The trust company, being liable for these balances improperly advanced, was held to have a lien upon the income of these ladies accruing to them under the terms of the trust-deed, and this lien was declared to continue in favour of the liquidator.

This action having been brought upon the bond, the defendants contended that the provisions of the Act under which the bond was demanded and given were *ultra vires* of this Province, so far as it was sought to apply them to a Dominion company.

As the trust company applied for and obtained registry under the Provincial Act, and as a term of receiving its license gave the bond now sought to be repudiated, neither the trust company nor its sureties can now be permitted to discuss the question sought to be argued. The Province demanded the bond as the price of the license. The bond was given and the license obtained. It is quite beside the mark to say now that the company might have done business in Ontario without a license. Upon this branch of the case we agree with the trial Judge.

The judgment appealed from gives, by way of assessment, damages in excess of the liability of the trust company in respect of these advances. The amount must be reduced, for the surety cannot be liable for any greater sum than the principal debtor. Upon payment of this sum the sureties will become subrogated to the lien against the accruing income. With this variation the judgment should be affirmed.

As the appellants had partial success only, there should be no costs of this appeal.

*Appeal allowed in part.*

## [APPELLATE DIVISION.]

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## SHIELDS v. SHIELDS.

May 14.  
June 10.

*Mortgage—Action by Mortgagee for Recovery of Mortgage-moneys and for Possession—Proceedings under Power of Sale—Mortgages Act, sec. 29.*

A mortgagee of lands, who has brought an action to recover the mortgage-moneys, and for possession of the mortgaged lands until paid, is not thereby prevented from taking proceedings under a power of sale contained in the mortgage-deed.

Section 29 of the Mortgages Act, R.S.O. 1914, ch. 112, has no application to such a case.

*Stevens v. Theatres Limited*, [1903] 1 Ch. 857, distinguished.

AN application by the plaintiffs for an interim injunction restraining the defendant from proceeding to a sale of mortgaged lands under the power of sale contained in a mortgage-deed.

May 13. The application was heard by MEREDITH, C.J.C.P., in the Weekly Court, Toronto.

*W. Lawr*, for the plaintiffs, cited *Stevens v. Theatres Limited*, [1903] 1 Ch. 857; *Poulett v. Hill*, [1893] 1 Ch. 277; *Williams v. Hunt*, [1905] 1 K.B. 512; *Lyon v. Ryerson* (1897), 17 P.R. 516; *Smith v. Brown* (1890), 20 O.R. 165.

*W. E. Fitzgerald*, for the defendant.

May 14. MEREDITH, C.J.C.P.:—There is no law, that I am aware of, which prevents a mortgagee of lands, who has brought an action to recover the mortgage-moneys, and for possession of the mortgaged lands until paid, also taking proceedings under a power of sale contained in the mortgage. Why should there be any such law? There is nothing inconsistent in the two proceedings. Possession is needed if the sale be made: and the amount realised at the sale must be applied towards payment of the mortgage-debt. If enough be realised upon the sale, the claim upon the covenant to pay the mortgage-moneys is satisfied; if insufficient, the judgment is needed for the recovery of the amount unsatisfied.

The enactment which was at one time commonly called Solomon White's Act—now the Mortgages Act, sec. 29\*—has no

\*Section 29 (1) of the Mortgages Act, R.S.O. 1914, ch. 112, is as follows:—

29.—(1) Where, pursuant to any condition or proviso contained in a mortgage, there has been made or given a demand or notice either requiring payment of the money secured by such mortgage, or any part thereof, or declaring an intention to proceed under and exercise the power of sale therein



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application to this case: it is not contended that it has: but several cases were relied upon by Mr. Lawr in support of the application: they were all, however, cases very different from this case. That which is nearest to it—if the word “near” can be applied properly to cases so far apart—is *Stevens v. Theatres Limited*, [1903] 1 Ch. 857, in which it was held, by Farwell, J., that, after a foreclosure decree *nisi* in an action, the mortgagee could not properly sell the mortgaged property under a power of sale contained in the mortgage; and I have not been able to find that that ruling has been questioned in any case. But, whether the ruling was based upon a merger of rights under the mortgage in the judgment, or upon an election of one of two inconsistent remedies, or howsoever, it has plainly no effect upon such a case as this. There is no foreclosure judgment or order in this action, nor could there be, as the action was not brought for foreclosure—no such relief was ever sought in it: indeed no judgment has been pronounced in it; it has been merely referred for trial to a judicial officer of the Court: and, after being in Court for so great a length of time without anything substantial having been accomplished, it is not much to be wondered at that the mortgagee should decide to take the matter into his own hands and endeavour to accomplish something in much less time.

It is said for the plaintiffs that the defendant cannot sell under the power contained in the mortgage, because it has not yet been decided just by whom and in what shares the lands are owned. But what has that to do with the case as a matter of legal right? What the mortgagee desires to sell, and that which alone he can sell, is just such rights and interests in the lands as the mortgage covers.

The application is refused with costs.

The plaintiffs appealed from the order of MEREDITH, C.J.C.P.

contained, no further proceeding and no action either to enforce such mortgage, or with respect to any clause, covenant or provision therein contained, or to the mortgaged property or any part thereof, shall, until after the lapse of time at or after which, according to such demand or notice, payment of the money is to be made or the power of sale is to be exercised or proceeded under, be commenced or taken unless and until an order permitting the same has been obtained . . . from a Judge of the Supreme Court.

June 10. The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

*J. D. Shaw*, for the appellants, referred to *Stevens v. Theatres Limited*, [1903] 1 Ch. 857; *Rhodes v. Buckland* (1852), 16 Beav. 212; *Cruso v. Bond* (1881), 9 P.R. 111.

*W. E. Fitzgerald*, for the defendant, respondent, was not called upon.

THE COURT dismissed the appeal with costs, the Chief Justice saying that there was nothing in the cases cited to warrant the Court in interfering with the decision below, which was clearly right.

[MEREDITH, C.J.C.P.]

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*Contract—Company Incorporated under Laws of Ontario—Sale of Shares—Undertaking of Company with Purchasers to Resell or Repurchase—Individual Undertaking of Principal Officer—Action by Purchasers against Company and Individual to Recover Moneys Paid—Judgment by Default against Individual—Affirmance of Contract—Election—Fraud and Misrepresentation—Evidence—Damages—Rescission—Power of Company to Make Agreement to Resell—Money Lent—Company Failing to Become Bound as to Essential Part of Agreement—Effect as to Establishmen of Contract—Costs of Action.*

The plaintiffs, two elderly spinsters, paid to the defendants, a company incorporated under the laws of Ontario, and S., who was the president of the company, certain sums of money, upon agreements executed by the company and S. personally, in the following or similar terms: "In consideration of . . . \$500 received, . . . from Miss M.W. and Miss H.W. . . . by the (company), in full payment of 5 shares of the par value of \$500, we hereby guarantee that, at any time after one year from the date hereof, upon receiving 60 days' notice in writing that said Miss M.W. and Miss H.W. . . . wish to dispose of their holdings in our company, we will resell or repurchase said 5 shares of the par value of \$500 at par with . . . interest . . ." The plaintiffs became the holders of certificates for the stock of the company. They brought this action against the company and S. alleging fraud, misrepresentation, and other grounds for relief and claiming to recover the moneys they had paid. The writ of summons was specially endorsed; the defendant S. did not appear; and the plaintiffs entered final judgment against him for the sums paid by them and interest. As against the company, the action proceeded to trial, and it was held:—

(1) That the plaintiffs could not recover damages for deceit: actual fraud had not been proved; but, if it had been, the plaintiffs, having taken final judgment against S., upon the contracts in respect of the shares, could not both affirm and repudiate them; the judgment against S. could have been only upon the claim upon the contracts; and the question whether a claim for damages for deceit, against several defendants, is merged in a final judgment upon it against one of them, did not arise.

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- (2) That, for the like reasons, the plaintiffs could not succeed upon a claim to set aside the transactions on the ground of actual fraud.
- (3) That the plaintiffs' claim to set aside the transactions on the ground of misrepresentation without actual fraud failed for want of proof of misrepresentation; and the election of the plaintiffs to affirm and enforce the contracts defeated a claim to set them aside.
- (4) That the plaintiffs could not enforce against the company the agreements to resell or purchase; for such agreements were *ultra vires* of the company. *Helwig v. Siemon* (1916), 10 O.W.N. 296, followed.
- Edwards v. Blackmore* (1918), 42 O.L.R. 105, referred to.
- (5) That the plaintiffs could not recover from the company the moneys paid upon the allegation that they were moneys lent to the company.
- Semble*, that, if the plaintiffs had not affirmed the transactions, they would have been entitled to relief upon another ground: the company, if they failed to become bound according to the terms upon which they were to get the money, could not retain it; when an essential part is omitted, there is no contract.

*Morris v. Baron & Co.*, [1918] A.C. 1, followed.

The action as against the company was dismissed, but without costs.

AN action brought by Margaret Ward and Helen Ward, plaintiffs, against the Siemon Company Limited and J. C. Siemon, defendants.

The plaintiffs, by their statement of claim, alleged (1) that they were spinsters residing in the city of Hamilton; that the defendant company were incorporated under the laws of Ontario, and were manufacturers of and dealers in lumber; and that the defendant J. C. Siemon was the president of the defendant company.

(2) That on or about the 1st December, 1910, the defendants (the company and J. C. Siemon) obtained from the plaintiffs the sum of \$500, and executed an agreement in the words following: "In consideration of the sum of \$500 received this day from Miss Margaret Ward and Miss Helen Ward, of the city of Hamilton, Ontario, by the Siemon Company Limited, in full payment of 5 shares of the par value of \$500, we hereby guarantee that, at any time after one year from the date hereof, upon receiving 60 days' notice in writing that said Miss Margaret Ward and Miss Helen Ward, or either of them, or their heirs or assigns, wish to dispose of their holdings in our company, we will resell or repurchase said 5 shares of the par value of \$500 at par with not less than 7 per cent. interest from date of investment until date of withdrawal, without expense or charges to the said Misses Ward, their heirs or assigns."

That, subsequently, on or about the 1st December, 1911, the defendants obtained from the plaintiffs the sum of \$100, and



executed an agreement in words in effect similar to those used in the agreement of 1910.

That, on or about the 26th December, 1912, the defendants obtained from the plaintiffs the sum of \$300, and executed an agreement in words similar to those used in the agreement of 1910.

That, on or about the 10th May, 1913, the defendants obtained from the plaintiffs the sum of \$200, and executed an agreement in words similar to those used in the agreement of 1910.

(3) That the plaintiffs have duly notified the defendants demanding a return of the money after the expiration of 60 days, on the terms set out in the above-mentioned agreements.

(4) That the defendants have, from time to time, made certain payments on account of the interest due on the moneys so advanced as aforesaid, but no payments have been made on account of interest since the 1st June, 1914. There is now due and owing the plaintiffs by the defendants the sum of \$1,375.91, made up as follows:—

December 1st, 1910.....	\$500.00
December 1st, 1911.....	100.00
December 26th, 1912.....	300.00
May 10th, 1913.....	200.00
Interest from June 1st, 1914, at 7 per cent.....	275.91
	<hr/>
	\$1,375.91

(5) That the money paid the defendants as aforesaid was advanced by the plaintiffs as a loan to be repaid by the defendants upon notice, as is provided in the memoranda of agreements more particularly hereinbefore set forth, and that the said payments were treated as loans by the parties hereto; and the plaintiffs further allege, in the alternative, that, if there was a subscription for stock, the same was induced by the representations made by the defendants that the money to be advanced was to be considered as a loan and could be returned at any time to the plaintiffs, and would be so returned upon due notice being given as provided in the said memoranda of agreements. As a result of the said representations, the plaintiffs were deceived and became the holders of stock certificates for the capital stock of the defendants the Siemon

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Company Limited, more particularly described in the said memoranda of agreements.

(6) That the plaintiffs did, on the 5th January, 1918, duly enter judgment against the defendant J. C. Siemon for the sum of \$1,370.78 and \$33.25 for taxed costs, and a writ of *fi. fa.* was thereupon issued directed to the Sheriff of the County of York, but no portion of the said amount has been paid, and the said sheriff has made a return to the said writ of *nulla bona*.

The plaintiffs therefore claim:—

1. The sum of \$1,375.91.
2. A cancellation of the said subscription for stock and a return of the money paid therefor.
3. The costs of this action.
4. Such further and other relief as to the Court may seem just.

The statement of defence of the defendant company was as follows:—

(1) The defendants the Siemon Company Limited say that, if the agreements referred to in the statement of claim were executed by the said defendant company, they are and each of them is *ultra vires* the company.

(2) The defendant company say further that, if any moneys were paid to them by the plaintiffs as alleged, such moneys were paid in respect of the subscriptions for shares of the capital stock of the company, regularly and properly made, and without any improper inducement or misrepresentation on the part of the said defendant company, and that shares of the capital stock of the company were properly and regularly issued to the plaintiffs and received and accepted by them.

(3) The defendant company expressly deny that the moneys paid by the plaintiffs as alleged were paid by the plaintiffs or received by the defendant company as a loan.

(4) The defendant company say further that the judgment taken by the plaintiffs against the defendant J. C. Siemon personally operates as a release and discharge of any claims of the plaintiffs against the defendant company.

The defendant company submit that this action should be dismissed as against them with costs.

The action was tried by MEREDITH, C.J.C.P., without a jury, at Hamilton.

*C. W. Bell*, for the plaintiffs.

*L. A. Landrian*, for the defendant company.

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May 14. MEREDITH, C.J.C.P.:—The plaintiffs' claims, though stated in a somewhat wandering and indefinite manner, if given a liberal interpretation and effect, may be said to comprise five different causes of action, namely: (1) for damages for deceit; (2) to set aside the transactions evidenced by the writings set out in the pleadings, on the ground of actual fraud; (3) to set them aside on the ground of misrepresentation without actual fraud; (4) to enforce them; and (5) for money payable by the defendants the company to the plaintiffs for money lent by the plaintiffs to those defendants: but on none of these claims can I find or consider the plaintiffs entitled to recover against the defendants the company; though the judgment against the defendant Siemon may be supported under the fourth.

As to the first: actual fraud has not been proved; it has been disproved. The sincerity of the defendant Siemon is shewn in his action in becoming personally bound to resell or purchase the shares of the capital stock of the defendant company which were transferred to the plaintiffs. And, if that were not so, yet must the plaintiffs fail on this ground, because they have taken final judgment, against the other defendant, upon the contracts in respect of the shares, and cannot both affirm and repudiate them. If obtained by fraud, they were voidable at their instance, but they are valid until rescinded, and not only has that not been done, but the plaintiffs have obtained judgment, and issued executions, upon them. The judgment was entered in default of appearance to a specially endorsed writ, which judgment could be entered, if at all, only upon the claim upon the contracts. As such a judgment could not have been entered upon a claim for damages, the interesting question, referred to in several cases, but actually decided in none that I am aware of, whether a claim for damages for deceit, against several defendants, is merged in a final judgment upon it against one of them, does not arise: it is difficult to see how it could arise in such a case, though, in some actions against joint contractors, it may arise and has so arisen: see *Dueber Watch Case Manufacturing Co. v. Taggart* (1899), 26 A.R. 295,



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and (1900) 30 S.C.R. 373; *Morel Brothers & Co. Limited v. Earl of Westmorland*, [1904] A.C. 11, per Lord Davey; *Goldrei Foucard & Son v. Sinclair and Russian Chamber of Commerce in London*, [1918] 1 K.B. 180; *Yost v. International Securities Co. Limited and MacPherson* (1918), 42 O.L.R. 572; *Verney v. Thomas* (1888), 36 W.R. 398; and *Macmillan v. Australasian Territories Limited* (1897), 76 L.T.R. 182. I speak of a final judgment, not merely an interlocutory judgment, or the "noting" of a party in default, in which cases the whole matter is dealt with finally at the one time—the trial.

The second also fails for the like reasons.

The third also fails, first, for want of proof of misrepresentation. It is true that the plaintiffs are elderly maiden women, inexperienced in such business transactions; but these transactions were all supervised in their behalf by a capable adviser, and were approved by him; so that there is no room for setting up any want of knowledge, or misunderstanding, of the nature and effect of the transactions, or any misleading by the defendants of the plaintiffs as to them, whatever might have been the case if the plaintiffs had acted alone in the matter. So too the election of the plaintiffs to affirm and enforce the contracts defeats any action to set them aside: see *Morel Brothers & Co. Limited v. Earl of Westmorland*, [1904] A.C. 11; *Scarf v. Jardine* (1882), 7 App. Cas. 345; and *Keating v. Graham* (1895), 26 O.R. 361.

As to the fourth: the case of *Helwig v. Siemon* (1916), 10 O.W.N. 296, is decisive against the plaintiffs. In a precisely similar case an Appellate Division of the Court held that the plaintiff could recover against the defendant Siemon, but could not recover against the defendants the company. If the recent case of *Edwards v. Blackmore* (1918), 42 O.L.R. 105, is authority to the contrary, is authority for saying that nothing is now *ultra vires* of an Ontario provincial corporation, some other tribunal must say so; I cannot; and in the meantime must follow the ruling in the case of *Helwig v. Siemon*.

And, as to the fifth: that which I have said as to the third covers it. Whatever the plaintiffs may now think, or may have thought at the time of these transactions, they are bound by what their adviser knew; they trusted in him, not in their own understanding: he knew all the circumstances; and, acting for them, read the papers evidencing the transactions, and found, and pro-

nounced, them to be accurate. So that it is not open to them now to contend that the transactions be treated as loans of money, merely because they now think, or even then thought, that was their character. They then abstained from reading the papers, or getting any further or better understanding of the matter themselves, because they had and trusted to one acting for them, who was, they considered, better able than they to protect their interests.

But upon another ground, resting on admitted facts, I should have considered the plaintiffs entitled to some other relief in this action if they had not affirmed these transactions as they have.

Each of these contracts was a single one, but they were all alike in all respects: the plaintiffs were, as an essential part of each contract, to have an obligation upon the defendants the company to resell or purchase the stock in the manner set out in the writings: if they have the right which such an obligation gives, then they are entitled, upon the contracts, to judgment against all the defendants: if they have it not, then the contracts have never been completed, and the plaintiffs are entitled to a return of their money, but from the defendants the company only: it was advanced to them and they received it; it was not advanced to the defendant Siemon, and he had not the benefit of it. The defendants the company, if they failed to become bound according to the terms upon which they were to get the money, could not retain it; there would be no contract: it would not have been a question of condition precedent or subsequent; it would have been a question of contract or no contract, and it is no contract when an essential part is omitted: see *Morris v. Baron & Co.*, [1918] A.C. 1.

But the plaintiffs cannot both approbate and reprobate; they cannot have judgment upon the contracts, and also judgment in effect setting them aside.

As the record now is, the action must be dismissed as to the defendants the company: but it is not a case for costs: these defendants ought to be under an obligation to resell or purchase or else should return the money; but, as things now are, circumstances, the effect of which, evidently, was not foreseen, have relieved them from it, and left their co-defendant liable.

The action is dismissed as to the defendants the company, but without costs.

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[MEREDITH, C.J.C.P.]

May 14

REINHART V. BURGAR.

*Contract—Promise of Gift and Loan of Money to Trustees of Church—Death of Promisor—Vis Major—Impossibility of Performance—Constructive Fraud—Costs.*

An action by the trustees of a church against the administrator of the estate of a deceased member of the congregation to enforce an agreement made between the trustees and the member, whereby she was to make a gift of \$1,000 to the church as a contribution to a fund for the erection of a parsonage and lend \$1,500 to the trustees to be also expended in the erection of the parsonage, was dismissed, on the ground that her death had made the performance of the agreement, having regard to its terms and conditions and the delay of the trustees in proceeding with the building, impossible of performance; and that part of the promised money which was meant to be charity and that part which was meant to be for a consideration could not be separated.

The transaction, it was considered, was not open to attack on the ground of constructive fraud.

The dismissal of the action was without costs.

ACTION by the trustees of a church to recover \$2,500 from the administrator of the estate of Salome Morningstar, deceased.

The action was tried by MEREDITH, C.J.C.P., without a jury, at Welland.

*S. F. Washington*, K.C., and *L. C. Raymond*, K.C., for the plaintiffs.

*T. D. Cowper*, for the defendant.

May 14. MEREDITH, C.J.C.P.:—Salome Morningstar, an aged, lone, maiden woman, was found dead in her house during the extremely cold weather of last winter, her death having, apparently, been caused by want of sufficient protection against the midwinter's extreme cold. She had been a thrifty woman, being worth, at the time of her death, about \$5,000. A farm, which she had owned and upon which she had lived quite alone, was sold by her last autumn for \$2,500, but she continued to live there only because the arrangements which she had made with the plaintiffs in this action, for a new home, had not been carried out.

After selling her farm, she entered into negotiations with the pastor of the Lutheran Church of the locality, of which she was a member, which negotiations ended in the making of the agreement which is the subject-matter of this litigation.



Her expressed purposes in entering into the agreement were to obtain a comfortable home for herself and to extend her charity to the church of which she was a member, and is said to have been a life-long member.

The agreement—dated the 13th November, 1917—was made between her and the trustees of the church; and it provides that she shall contribute towards the erection of a “parsonage,” for the church, as a gift, \$1,000, and shall lend to the trustees \$1,500 to be also expended in the erection of the parsonage; that the parsonage shall be erected on a certain acre of land, and that the building of it shall be “proceeded with at once” by the trustees; that provision shall be made satisfactory to her for her own quarters in the parsonage, and that she shall have the right to occupy them for life; that she shall be paid interest upon the loan half-yearly at five per cent., and shall have a lien on the parsonage for the payment of it, and for payment of any part of the principal not exceeding \$100 a year that she might from time to time require; but that, if it were not all thus repaid in her lifetime, that which remained unpaid should belong to the church; that the deed of the land should be made to her; and that, as soon as the deed should be made to her, she should advance the \$1,000 to the trustees to enable them to proceed with the erection of the building.

The trustees did not proceed at once with the erection of the building, nor did they procure the making of the deed of the land to her, though they obtained an informal agreement for the sale of the land to the congregation before the agreement in question was formally made. Plans of the house were procured and approved, and some gravel for building purposes was drawn to the site of the building by some of the congregation; but nothing else seems to have been done, regarding the scheme, on either side.

Salome Morningstar is said to have died intestate, and letters of administration of her estate have been granted to the defendant; and this action is brought against the administrator to recover from the estate the \$2,500 which Salome Morningstar had agreed to pay to the trustees for the purposes and in the manner before mentioned.

By that which the law deems *vis major*, it has become impossible to carry out the agreement for all the purposes, and in the manner,

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agreed upon. The deed of the land cannot now be made to Salome Morningstar; and it was only upon that being done that she was to advance the money. One main purpose of the scheme also fails—she cannot have the suitable home which it was to provide for her, though it may be that, if the erection of the building had proceeded at once, she might be having the benefit of it now.

The case is not one of merely a condition subsequent which cannot be performed because of the intervention of *vis major*. *Vis major* prevents the plaintiffs from doing that upon which they were to be paid the money in question; and that which might, and indeed ought to, have been done before the woman's pitiful death.

Her death disjoins the whole agreement, its purposes and its performance; and so it is unenforceable on either side: Salome Morningstar cannot have the benefits it was designed to bring to her; and the church cannot now do those things for the doing of which the money was to go to it. And that which was meant to be charity and that which was meant to be for a consideration cannot be separated. It may be that except for the consideration there would have been no charity; that consideration would have been obtained, and charity have gone, elsewhere.

And it may be added that, not only did not the plaintiffs procure the deed, as they were bound to do before they could demand from Salome Morningstar the money in question, but they have not even yet bound themselves to purchase the land; and little, very little, else has been done by them in the expectation of receiving this money; although it may be that all they were obliged to do might have been done before the day upon which the lone, woman died.

On this ground, in my opinion, the plaintiffs are not entitled to take anything from the estate of Salome Morningstar. Neither under the words of the agreement, nor by the intention of the parties to be gathered from those words, read in the light of the surrounding circumstances, are the plaintiffs entitled to the money in question or any part of it.

Mr. Cowper contended that the plaintiffs should fail, also, on the ground of that which is sometimes called constructive fraud—want of independent advice and improvidence being mainly re-

lied upon. But, in my opinion, the transaction cannot be successfully attacked on any such ground. The woman seems to have been treated with fairness and consideration by the pastor and by the congregation. The scheme was submitted to the congregation, and was fairly considered at several meetings held for the purpose, at some of which Salome Morningstar was present; and, after it had been accepted by the congregation, it was put in the form in which it was executed, by a firm of responsible solicitors of the county town of the county in which the parties resided. That it was in one respect not only provident, but necessary in the interest of the woman, her sad death proves.

The case is not one for costs. Circumstances which no one foresaw, and for which no provision was made, left the parties to this action in doubt in respect of the agreement, so that it was necessary that their rights should be judicially considered: and they have come here displaying much fairness and apparent desire to do only that which is lawful and right, on each side, in order that they may be so apprised of such rights: therefore, though the action must be dismissed, it is dismissed without costs.

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May 15.

SMITH v. GOSNELL.

*Contract—Deposit Made by Father in Bank to Joint Credit of himself and Son—Document Signed by both—Survivorship of Son—Construction of Document—Direction to Bank—Evidence of Intention of Father—Will—Disposition of Estate—Testamentary Gift—Action against Executors and Legatee to Establish Right of Son to Money Deposited—Costs.*

The plaintiff's father made a deposit of money in a bank, and he and the plaintiff signed a memorandum, addressed to the manager of the bank, saying that they thereby agreed jointly and severally with the bank and each with the other that any moneys which might from time to time be placed to the credit of their joint names and the interest thereon should be subject to withdrawal by either of them, and that the death of one should not affect the right of the survivor to withdraw such moneys and interest; and each of them irrevocably authorised the bank to pay any such moneys and interest to either of them and to the survivor. The money deposited was entirely that of the father, who died shortly afterwards.

In an action against the executors and a legatee under the father's will for a declaration of the plaintiff's right to the money, evidence as to the intention of the testator was admitted, and some of it shewed an intention to benefit the plaintiff. The father, by his will, which was made two months after the signing of the memorandum, bequeathed \$300 to the plaintiff, and made no mention of the deposit:—



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*Held*, that the memorandum was not a contract between the father and son, but merely a direction to the bank; and the plaintiff was not entitled to succeed.

*Southby v. Southby* (1917), 40 O.L.R. 429, 432, followed.

Some of the evidence appeared to indicate that the purpose of the father was to make a gift to the plaintiff in its nature testamentary, which he could not effectually do save by an instrument executed as a will.

*Hill v. Hill* (1904), 8 O.L.R. 710, referred to.

Costs of all parties were ordered to be paid out of the father's estate.

ACTION against the executors of Thomas Smith and against William Perrin, a legatee under the will of Thomas Smith, for a declaration that certain moneys deposited in a branch of the Molsons Bank to the credit of Thomas Smith and Isaac Smith (the plaintiff) jointly had become the absolute property of the plaintiff upon the death of Thomas Smith, who was the plaintiff's father, and that the plaintiff was entitled to payment thereof.

The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at Chatham.

*R. L. Brackin*, for the plaintiff.

*R. L. Gosnell*, one of the executors, in person and on behalf of his co-executor, defendants.

*O. L. Lewis*, K.C., for the defendant William Perrin.

May 15. FALCONBRIDGE, C.J.K.B.:—The plaintiff is one of the sons of the late Thomas Smith.

In January, 1917, the plaintiff and his father called at the branch of the Molsons Bank in Merlin, Ontario, and saw Mr. Lake, the manager there, and explained that the father desired to place his money in the bank, so that the plaintiff would have free access to it. Mr. Lake explained the purport of exhibit 2, and also told them that Isaac would, in the event of the death of his father, have full control of the fund. On that occasion the father said he would reconsider the matter.

On the 9th June, 1917, the plaintiff and his father called again at the bank, and they both signed exhibit 2, which is in the words and figures following:—

“The Molsons Bank.

“To the Manager,

“Merlin, Ont., Branch.

“Dear Sir: We, the undersigned, hereby agree jointly and severally with the Molsons Bank and each with the other that any moneys which may from time to time be placed to the credit

of our joint names, and the interest thereon, shall be subject to withdrawal by either of us, and that the death of one of us shall not affect the right of the survivor to withdraw such moneys and interest. And each of the undersigned irrevocably authorises the said bank to pay any such moneys and interest to either one of us and in the case of death to the survivor.

"Yours truly,

"Thomas Smith,

"Isaac Smith.

"Dated at Merlin, Ont.

"June 9, 1917.

"Memo. for Branch:

"Account opened as No. 5083."

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The father took away the bank pass-book, shewing the commencement of the account. It is quite clear that the plaintiff did not contribute any money to this deposit, which was entirely the money of the father.

Exhibit 1 shews the state of the account, which, with accrued interest, shews a balance of over \$1,600.

The father died on or about the 27th August of the same year, having on the 21st August made his will, which has been admitted to probate. By that will, which makes no mention of the deposit account, after direction for payment of debts etc., he makes specific bequests of all his estate, amongst which is a bequest to the plaintiff of \$300, and he directs, if there be a surplus after payment of the debts, that the surplus be divided among the legatees proportionately, but in case there is a deficiency it shall be made up by a proportionate reduction of the legacies of all the legatees except William J. Perrin, who is the largest legatee (\$500).

The plaintiff claims in this action that, upon the death of his father, all moneys then in the joint account became the plaintiff's absolute property. The defendants deny the plaintiff's right and assert that the moneys belong to and form part of the estate of the said Thomas Smith.

In their statement of defence, the executors submit that the legatees named in the said will should be made party defendants. Mr. Lewis appeared for the principal legatee—they are all in the same interest, and, if necessary, the legatees may now be added as parties.

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Evidence was admitted as to the intention of the testator. The plaintiff had worked the farm for his father for about 15 years on shares, but says that he never got anything except a few odd products occasionally, and not every year. His father did give him about \$400 about a year ago, and also paid for sinking a well—about \$125. The father lived with the son about a year and a half after the mother died. About three weeks before he died, the Perrins, son-in-law and daughter, came and took him away to their place, where he departed this life.

The plaintiff swears that his father said that the rest of the family had got all he meant to give them, as the plaintiff had done everything for him. The plaintiff's wife corroborates this statement, and says that the father said that he, the plaintiff, could draw the money any time he liked: he was the only one who had ever waited on him and worked for him without any pay.

Joseph Gutridge, a respectable-looking farmer, says that the father told him he wanted the money put away on joint account, so either Isaac or he could draw it; that Isaac, the plaintiff, was the only one who ever did anything for him, and he wanted him to have the money.

Hiram Davis says that the father said, "When I am done, I want my son Isaac to have it."

The father seems to have made his will with full knowledge of what he was doing, and insisted on the insertion of the name "Frank Smith" for a nominal sum (\$5).

Phœbe Perrin, mother of William Perrin, says that the father said that the money was put in joint account so that Isaac could draw money if he, the father, was sick, in June.

As Meredith, C.J.C.P., points out in *Southby v. Southby* (1917), 40 O.L.R. 429, at p. 432, 38 D.L.R. 700, at p. 702, the writing (exhibit 2) is in no sense a contract between the parties. It is merely a direction to the bank, on a printed general form prepared and supplied by the bank, for its protection only.

Some of the evidence for the plaintiff, particularly that of Hiram Davis, seems to point to the purpose of the father being to make a gift to the plaintiff in its nature testamentary, which he could not effectually do except by an instrument executed as a will, as in *Hill v. Hill* (1904), 8 O.L.R. 710.

I think, as a result of all the cases, the plaintiff is not entitled to succeed.



I refer also to Halsbury's Laws of England, vol. 22, para. 823; *Re Ryan* (1900), 32 O.R. 225; *Schwent v. Roetter* (1910), 21 O.L.R. 112; *Everly v. Dunkley* (1912), 27 O.L.R. 414, 8 D.L.R. 839.

I am of the opinion that the plaintiff presents what he believes to be an honest claim; and, in view of all the circumstances, as the testator is responsible for the present situation, the costs of all the parties should be paid out of the estate.

The plaintiff's legacy will suffer proportionately, if there should be any deficiency.

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[APPELLATE DIVISION.]

CLEMENT V. NORTHERN NAVIGATION CO. LIMITED.

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*Negligence—Carriers—Waggon Delivered on Wharf by Men Employed in Ship and Left in Dangerous Position—Place of Deposit Indicated by Wharfinger—Direction—Responsibility—Master and Servant—Wharf a Public Place or Highway—Child Lawfully on Wharf Killed by Overturning of Waggon—Trap—Nuisance—Liability of Carriers—Fatal Accidents Act—Reasonable Expectation of Pecuniary Benefit to Parents—Damages.*

The defendants carried for hire, in one of their ships, a crated waggon to the place of consignment, and some of the ship's crew, under the direction of the mate, placed it upon the public wharf there, at a spot indicated by the wharfinger, where it stood leaning against a storehouse. A boy of 6 years, the son of the plaintiffs, was, on the following evening, upon the wharf, accompanied by his parents. While at play with other children, he climbed upon the leaning waggon, which fell over on him, and so injured him that he died. The wharf belonged to the Dominion Government, and was under the control of their wharfinger, subject to the regulations contained in an order in council, which provided that no goods should be landed upon the wharf unless by permission of the wharfinger and in such manner and place as he might direct. By the custom of the port, goods from vessels were not handled by the wharfinger, but were landed by the crew under the direction of the wharfinger as to the place of deposit:—

*Held*, that the selection by the wharfinger of the place of deposit and the indication of the place did not make the men his servants or make him liable for their negligence.

The accident was caused by leaving the leaning crate too nearly in a perpendicular position: the men who so left it were guilty of gross negligence, and thereby created a common nuisance, for which the defendants, their employers, were liable.

The boy was lawfully upon the wharf, which was a public place or highway; the waggon, placed as it was, was a lure to the boy, and, as it turned out, a trap; and the negligence of the defendants' servants was the actual cause of the boy's injury and death.

*Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, followed. The liability of the defendants did not terminate with the departure of their servants from the premises, but continued so long as the nuisance was not abated, or until the effect of their negligence ended.

There was a reasonable expectation of pecuniary advantage to the plaintiffs in the future from their deceased son; and they were entitled, under the Fatal Accidents Act, to recover damages.

Judgment of SUTHERLAND, J., reversed.

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ACTION by F. A. Clement and Josephine Clement, husband and wife, to recover damages, under the Fatal Accidents Act, for the death of their infant son, 6 years old, by reason of the negligence of the defendants or of a nuisance for which the defendants were responsible, as the plaintiffs alleged.

March 27, 1917. The action was tried by SUTHERLAND, J., with a jury, at Sault Ste. Marie.

*J. E. Irving*, for the plaintiffs.

*J. L. O'Flynn*, for the defendants.

September 17, 1917. SUTHERLAND, J.:—On the evening of the 18th July, 1916, the defendant company landed on the Government wharf at Thessalon, Ontario, a crated democrat, which they placed thereon at the point on the wharf and in the position indicated by the Government wharfinger. When so placed, it was leaning against the face of the warehouse on the wharf. The wharf in question was a resort for the people in the locality, and on the following day the plaintiffs, F. A. Clement and Josephine Clement, with their son, Joseph Wright Clement, a boy of 6 years of age, went upon the dock for the purposes of rest and recreation. The boy in question, with two other children, were attracted to the democrat waggon, and, when they attempted to get upon it, it overturned and fell, injuring the boy so badly that as a result he died a few days later.

The plaintiffs in this action charge that the defendants were guilty of negligence in that they knew or ought to have known that there was a likelihood of injury resulting to children resorting to the wharf and playing at or upon a democrat thus crated and erected. They say that it was dangerous in itself from the state or position in which it was placed, and constituted a danger to those using the wharf, and was in fact a nuisance.

They further say that the servants of the defendant company, meaning the employees of the defendants' boat from which the democrat was taken and placed upon the wharf, might have deposited it in a safe position, but that, as placed, it was abnormally dangerous, and was so placed without proper precautions to guard the public from injury, thus constituting a nuisance.

In the alternative, they allege that the defendants' servants negligently placed the democrat waggon in a dangerous position,

knowing that it was likely to cause injury, and that the death of the boy was the proximate result of such negligence.

The defendants say that they are carriers by water, and received the democrat at the port of Owen Sound to be carried to the port of Thessalon; that it was so carried on their steamer "Germanic," and delivered at the port of Thessalon and there received and taken in charge by the Government wharfinger, and they allege and plead that, after such reception and taking in charge, they had no further custody of or control over the same, and any liability in respect of the same on their part thereupon ceased.

They further say that they were in no wise responsible for the manner in which the goods and chattels on the wharf were located or stored, nor had any control over the same, and were not responsible to the plaintiffs in respect to the democrat whilst upon the wharf or in respect to its storage thereupon.

They further allege that the deceased had no right to be upon the wharf, and that the plaintiffs were guilty of negligence in taking him there and allowing him to be out of their custody, and that such negligence was the proximate cause of the accident, by reason of which the plaintiffs are not entitled to recover in respect thereof.

The action was tried before me with a jury on the 27th March, 1917, and at the conclusion of the case I submitted the following questions to the jury for their consideration:—

(1) Was the defendant company guilty of any negligence which caused the accident in question? A. No. Bert Case (foreman).

(2) If so wherein did such negligence consist?

(3) Did the crate from its construction and the position in which it was placed constitute a nuisance?

(4) Did the mate or crew of the defendant company's ship "Germanic" receive instructions from the dock wharfinger where and in what position the crate in question was to be placed?

(5) If so, did they place it where and in the position so directed?

(6) Was it so placed under the observation of the wharfinger?

Damages, if any?

In charging the jury I said, among other things:—

"In case you have answered the first question 'No,' that there was no negligence, then there is not much use of your proceeding to answer any other question, or to estimate the damages, because the case is based upon negligence, and it is only after the plaintiffs

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have shewn by proper evidence that some negligence of the defendants has caused or contributed to the accident and upon the jury's finding that, that the action is made out, and the jury has a right to proceed to consider the question of damages."

No objection was taken by counsel for the plaintiffs with respect to the said direction to the jury or to the charge otherwise.

The jury answered question 1, "No;" and, on learning this when they came in, I made the following statement: "The jury have not considered it necessary to answer any of the other questions." I thereupon mentioned the question of costs, and suggested that perhaps, if the case went no further, the defendants might be willing to waive costs. There is no note upon the record of this, but there is the following statement: "In order to give Mr. Irving time to consult with his client in the matter of costs, judgment was not immediately entered." I was about to endorse the record to the effect that, upon the answers of the jury, judgment should be entered for the defendants, when this occurred.

Subsequently counsel for the plaintiffs raised the point that question No. 3, in which the jury was asked whether the crate from its construction and the position in which it was placed constituted a nuisance, had not been answered, and that there might be a nuisance without negligence. After some discussion, it was agreed that I should hear counsel later on this question. In the meantime the jury had been discharged.

Subsequently, by consent, on the 5th June, 1917, counsel appeared before me and agreed to submit the matter to me upon the evidence, and to argue the case thereupon as though no jury notice had been given, but the case tried before me without a jury.

During the argument I formed the opinion and intimated that such was my view that, whether the case was viewed from the standpoint of an ordinary action for alleged negligence, or as an action in which damages were claimed for injuries resulting from a nuisance, the plaintiffs could not succeed as against these defendants. I reserved the matter, however, for further consideration; but I have not been able to alter the opinion then formed.

It appears to me that once the defendants by their employees unloaded the democrat from their vessel and delivered it on the Government wharf at the spot thereon and in the position indi-

cated by the wharfinger, in fact under his supervision, they had nothing further to do with it. If it was negligent to leave it in that position, or if as so left it constituted a nuisance, in either case I am of opinion that damages for injuries resulting could not be claimed as against the defendants in this action, but only as against the owners of the wharf.

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The action must therefore be dismissed, with costs, if asked.

The plaintiffs appealed from the judgment of SUTHERLAND, J.

January 22 and 23. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*J. E. Irving*, for the appellants. The action is framed both on nuisance and on negligence, and the maxim *respondeat superior* applies to the case. The learned trial Judge erred in his view that no action lay against the defendants because the wharfinger was a Government employee, and it was on that basis that the jury found that the defendants were not guilty of negligence. The crew were acting as servants of the defendants in what they did, and the defendants are responsible for the consequences of their negligence. The wharf was a public place, and, in the wide sense of the word, a highway, and the children were there as a matter of right, apart from any question of acquiescence, or license, or invitation. The wharf was publicly owned, was situated at the junction of land and water highways, and was in fact an extension of a public street. Counsel referred to Shearman and Redfield's Law of Negligence, 6th ed., vol. 2, para. 365; also para. 333 and cases there cited, which are stated to follow the English doctrine on the subject. The right of public use is recognised by statute: The Government Harbours and Piers Act, R.S.C. 1906, ch. 112, sec. 6, as enacted by the amending Act 8 & 9 Edw. VII. ch. 17. Such public use is not confined to a mere right to transact business, as that is not a public, but an individual, right. Of course the Crown may prohibit such use, but it did not do so in this case. It may be true that as a matter of contract the defendants are not responsible; but this does not relieve them from their responsibility to the public where they or their servants created or contributed to the danger. Reference was made to Halsbury's Laws of England, vol. 20, para. 640; vol. 1, para. 470; vol. 21, paras. 953, 954;

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*Crane v. South Suburban Gas Co.*, [1916] 1 K.B. 33, *per* Avory, J., at p. 36. As to the duty and responsibility of a licensee, reference was made to Halsbury, *op. cit.*, vol. 21, para. 663, and cases there cited, especially *Corby v. Hill* (1858), 4 C.B.N.S. 556, 567; *Heaven v. Pender* (1883), 11 Q.B.D. 503, at p. 512, where Brett, M.R., refers to the judgment of Willes, J., in the *Corby* case; *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, *per* Hamilton, L.J., at p. 419. The case at bar is a stronger case against the defendants than *Findlay v. Angus* (1887), 14 Rettie 312, in which it was held that a door insufficiently fastened was a thing dangerous in itself. He also referred to *Harrold v. Watney*, [1898] 2 Q.B. 320; *Lynch v. Nurdin* (1841), 1 Q.B. 29; *Ricketts v. Village of Markdale* (1900), 31 O.R. 610; and, on the question of damages, to *Renwick v. Galt Preston and Hespeler Street R.W. Co.* (1906), 12 O.L.R. 35, 37.

*R. I. Towers*, for the respondents, the defendants. The liability of the defendants as carriers ended when the goods were delivered at the wharf. The crew were not acting as servants of the defendants, but were under the direction of the wharfinger. The defendants were not bound to deliver on the dock, but only at the ship's rail. The evidence shews that the wharfinger assumed possession of the goods, and, for the time being, control of the crew. What they did was voluntary, and the carriers are not responsible for the consequences: *Murray v. Currie* (1870), L.R. 6 C.P. 24, followed in *Donovan v. Laing Wharton and Down Construction Syndicate Limited*, [1893] 1 Q.B. 629, which went further than the *Murray* case. He also referred to *Caledonian R.W. Co. v. Mulholland*, [1898] A.C. 216; *Malone v. Laskey*, [1907] 2 K.B. 141. Assuming the ownership of the wharf by the Dominion Government, persons using it are merely licensees, and have only rights as such. The defendants gave no license to use the wharf, and cannot be held liable. *Jenkins v. Great Western Railway*, [1912] 1 K.B. 525, is very much in point, as shewing the basis of an owner's duty to a child and an adult respectively, and it is distinguished from the "turn-table" case, *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229. There is no element of allure-ment in this case, and it is only in that respect that a higher duty is owed to a child than to an adult. *Pickard v. Smith* (1861), 10 C.B. N.S. 470, seems almost conclusive in favour of the defend-



ants: see *per Williams, J.*, at p. 477. The *Crane* case, *supra*, is distinguishable, as the ground of decision was, that an inherently dangerous article had been left in a dangerous place. The mate and crew were merely the respondents' *general* servants, and the *Pickard* case applies, as shewing that, when they were under the control of the wharfinger, the respondents were not liable for the consequences of their acts. In any case it is very doubtful whether the plaintiffs have suffered any pecuniary damage.

*Irving*, in reply, referred to *Ballard v. Morris and Silverthorn* (1917), 12 O.W.N. 48; *Petrocochino v. Bott* (1874), L.R. 9 C.P. 355, *per Brett, J.*, at p. 361, as to usage at the dock; *McCartan v. Belfast Harbour Commissioners*, [1911] 2 I.R. 143, *per Lord Dunedin*, at p. 150. The citation from the *Pickard* case relied upon by the defendants is simply a remark made by one of the Judges during the argument.

May 17. The judgment of the Court was read by MACLAREN, J.A.:—This appeal was brought from a judgment of Sutherland, J., rendered on the 17th September, 1917, which dismissed an action, brought under the Fatal Accidents Act, by the father and mother of the infant Joseph W. Clement, aged 6 years. The action was based both on negligence and on nuisance.

The defendants received at Owen Sound a crated democrat waggon, weighing about 800 or 1,000 pounds, consigned to Thesalon, on the north shore of Lake Huron, whither it was taken on their steamer "Germanic" and landed upon the Government wharf there, about midnight on the 17th September, 1916. The mate of the steamer, who had charge of the 5 or 6 men who unloaded it, asked the wharfinger where they should place it, and he directed it to be deposited leaning against the storehouse on the wharf, which was done; the axles of the waggon protruding through the boards of the crating and resting upon the flooring of the wharf. The following evening between 6 and 7, the plaintiffs and their children came to the wharf, which was a usual resort for the townspeople to enjoy the fresh air; and, while Mr. Clement and the wharfinger were seated and engaged in conversation, Joseph and two other smaller children climbed on the leaning crated waggon, which fell over on them, and Joseph received injuries from which he died, 6 days later.

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The trial Judge found that the employees of the defendants unloaded the waggon from their vessel and delivered it on the Government wharf, at the spot and in the position indicated by the wharfinger, in fact under his supervision, and that they had nothing further to do with it. He adds: "If it was negligent to leave it in that position, or if as so left it constituted a nuisance, in either case I am of opinion that damages for injuries resulting could not be claimed as against the defendants in this action, but only as against the owners of the wharf."

The wharf in question belonged to the Dominion Government, and it was under the control of their wharfinger, and was regulated by an order in council of the 12th June, 1889, which, by sec. 9, provided that no goods or materials of any kind should be landed or placed upon it unless by permission of the wharfinger, and on such portion of the wharf as might be allowed, and should be so landed and placed in such a manner as the wharfinger might direct.

It was argued before us, for the defendants, that the old maritime rule that consignees are obliged to take delivery of cargoes and freight at the rail of the vessel should be applied here; and that, consequently, the defendants had no liability beyond that point, and that their employees were really the servants of the wharfinger and under his direction and acting for the consignees when they deposited the crate on the wharf and leaning against the wall of the warehouse. It is not necessary to consider whether the above maritime rule applies to the case of our inland coasting passenger steamers, carrying miscellaneous articles of freight for numerous private consignees, and it is a matter of common knowledge that local wharfingers do not as a rule handle such freight, but that the vessel employees do so under the direction of the wharfinger as to location of deposit. In the present case the custom of the port is clearly proved, and this is sufficient to override the above rule, even if it would otherwise have been in force. See Halsbury's Laws of England, vol. 10, p. 290, para. 544; *Marzetti v. Smith and Son* (1883), 49 L.T.R. 580.

The evidence is, that about 6 deck hands carried the crate in question off the boat, and the mate asked the wharfinger where they should place it, and he directed them to place it over against the wall of the warehouse, near the door, leaning against the wall, which they did.

The freight charges on the crate had been prepaid, and these included the charge for carrying it to the place indicated by the wharfinger. The latter collected from the consignee only the wharfage dues, 25 cents. The wharfinger kept no staff for handling such freight; and, in my opinion, the mere selection of the place of deposit and the indication of the place to the mate did not make the men his servants or make him liable for their negligence.

The accident was clearly caused by the fact that the leaning crate was left too nearly in a perpendicular position. This was the act of the men who placed it in such a position and leaning at such an angle. To my mind, by leaving it in that position, they were guilty of gross negligence, and thereby created a common nuisance. Whether or not the wharfinger also became liable for not abating the nuisance, we need not now inquire, as he is not a party to the suit, and it was landed at midnight, when it probably was dark. In addition to the natural presumption arising from the fact that the crate did actually turn over and fall upon the children, there is evidence from actual experiment, after it was raised up and replaced, that a very slight pressure or weight was sufficient to draw it away from the wall, and the wharfinger found it necessary to place a block of wood under the outer side of the crate to prevent the recurrence of another similar accident. There is no doubt that the men who placed it in such a dangerous position should have made it lean at a different angle or have placed a block or other support under the outer edge. As it was left by them, it was a veritable trap.

The wharf was really a continuation of Algoma street, which terminated at the water's edge, and was open to the public, and a popular resort for rest, recreation, and fresh air. The mate himself admits that children, as well as adults, were in the habit of going there when the boat called in the day-time, especially when the weather was fine.

The present case has much in common with an Irish case in which the Irish Courts held that a railway company was not liable, but which was reversed by the House of Lords: *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229. The facts of the present case are, in my opinion, much more favourable for the plaintiff than those of the *Cooke* case. Lord Atkinson says, at p. 237:—

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"It would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads, and public places may not unlikely be frequented by children of tender years and boys of this character; and, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys and children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred."

The facts in the present case are much more favourable for the plaintiffs than in the Irish case. In the first place, Joseph W. Clement was not a trespasser, as were the Irish boys. He and his family may be said to have been the guests of the wharfinger at the time, and were seated with him and engaged in friendly conversation, and, if not strictly invitees, they were, at the very lowest, licensees. The wharf was a "public place," and not private property as in the *Cooke* case, and the Clement children did not intentionally set any machinery in motion, as was done in the other case. Besides, there is evidence in this case that the plaintiffs were on the alert to prevent their children intermeddling with the implements on the wharf, although they did not observe until too late their approaching this fatal trap.

The employees of the company having thus been guilty of negligence and having created a nuisance, their liability would not terminate with their departure from the premises, as the trial Judge suggests, but would continue so long as the nuisance was not abated, or until the effects of their negligence ended. Even if the wharfinger were guilty of negligence in not abating the

nuisance, or not making the crate safe after he became aware of its dangerous position, he would thereby become a joint tort-feasor with the defendants, and be jointly and severally liable with them. The plaintiffs might sue any one or more of them at their choice, and each would be liable for the whole damage: Pollock on Torts, 9th ed., p. 202. As, however, no claim is made against the wharfinger, this point does not arise.

The liability of the defendants being so established, and there being evidence of a reasonable expectation of pecuniary advantage to the plaintiffs in the future from their deceased son, it becomes our duty to assess such damages, which we do at the sum of \$600, apportioned \$200 to the father and \$400 to the mother.

The appeal must be allowed, and the defendants condemned to pay \$600, with the costs of both Courts.

*Appeal allowed.*

[APPELLATE DIVISION.]

ORTH V. HAMILTON GRIMSBY AND BEAMSVILLE  
ELECTRIC R.W. Co.

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May 17.

*Negligence—Collision of Electric Car with Automobile Crossing Line of Railway—Dangerous Highway Crossing—Duty of Person about to Cross—Reasonable Care—Failure to “Stop Dead”—Findings of Jury—Negligence of Persons Operating Electric Car—Head-light—Evidence.*

The plaintiff, driving a motor-car, on a dark night, came into collision with an electric car of the defendants, running on rails, when attempting to cross the rails at a regular crossing. At the trial of an action for damages for injury to the plaintiff and his car, the jury found that the accident was caused by the negligence of the defendants, in that there was no light on the front of the car at the time of the accident; also, that the plaintiff did not use enough care, and should have stopped dead at a dangerous crossing:—

*Held*, that the extent of the care required from a person about to cross in front of an engine or car running on rails, depends entirely on the particular conditions of each case: in each case what is reasonable care is a question to be decided by the jury, according to the facts of the case.

*Grand Trunk R.W. Co. v. McAlpine*, [1913] A.C. 838, *Rex v. Broad*, [1915] A.C. 1110, *Grand Trunk R.W. Co. v. Hainer* (1905), 36 S.C.R. 180, and *Ramsay v. Toronto R.W. Co.* (1913), 30 O.L.R. 127, referred to.

The finding of the jury as to the plaintiff's negligence indicated that they appreciated the circumstances—they might well have thought that looking was not enough, and that, on a dark night, at a dangerous crossing, reasonable care demanded a stop, as listening might be useless if the plaintiff's motor was in motion.

That finding was sufficient to dispose of the case in favour of the defendants. *Semble*, that the finding of the jury against the defendants, as to the light, was not sustainable as a finding of negligence.

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APPEAL by the plaintiff from the judgment of LATCHFORD, J., at the trial, upon the findings of a jury, dismissing the action with costs.

The action was brought to recover damages for personal injuries sustained by the plaintiff and injury to his automobile in a collision between his automobile and a car of the defendants at a crossing of the defendants' railway.

February 19. The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and KELLY, J.

*T. S. Elmore*, for the appellant, argued that he was entitled to judgment on the finding of the jury that the defendants were guilty of negligence, and that their answers to the 3rd and 4th questions were not such a finding of contributory negligence as should disentitle him to the damages found. He referred to *Barry R.W. Co. v. White* (1901), 17 Times L.R. 644; *Grand Trunk R.W. Co. v. Hainer* (1905), 36 S.C.R. 180; *Beven on Negligence*, 3rd ed., vol. 1, pp. 150, 153, 154.

*S. F. Washington*, K.C., and *A. H. Gibson*, for the respondents, the defendants, argued that the action had been properly dismissed on the answers of the jury. There is no law requiring the defendants to carry a head-light on the front of the car. They referred to *Zuvelt v. Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 602; *Ramsay v. Toronto R.W. Co.* (1913), 30 O.L.R. 127, 17 D.L.R. 220; *Morrison v. Dominion Iron and Steel Co.* (1911), 45 N.S.R. 466; *Grand Trunk R.W. Co. v. Sims* (1907), 8 Can. Ry. Cas. 61.

*Elmore*, in reply.

May 17. The judgment of the Court was read by HODGINS, J.A.:—Collision between an electric car of the respondents and the appellant's motor-car, where a road crosses the respondents' right of way. The stone-road from which the cross-road leads is parallel to the right of way. The cross-road itself makes an acute angle with the stone-road, so that, in order to make the turn into it, if coming from the south, it is necessary to swerve towards the ditch on the east and make a wide circle, bringing the motor almost facing the direction whence it came.

The collision occurred on a dark night, and the questions and answers of the jury are as follows:—



"1. Was the accident to the plaintiff caused by the negligence of the defendants? A. Yes.

"2. If so, in what did such negligence consist? A. In our estimation according to the evidence that there was no light on the front of the car at the time of the accident.

"3. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. We think he did not use enough care.

"4. If so, in what did such want of care consist? A. In not stopping dead at before a dangerous crossing.

"5. What damages did the plaintiff sustain by reason of the accident? A. \$500."

It appears from the plan that there is practically nothing to obstruct the view either up or down the right of way of any one desirous of crossing. The appellant, however, did not see the car, and he and his motor were injured.

While the Courts have consistently refrained from tying themselves down to the formula of "stop, look, and listen," as expressing the whole duty of reasonable care, it is only because the extent of the care required depends entirely on the particular conditions of each case.

Lord Atkinson in *Grand Trunk R.W. Co. v. McAlpine*, [1913] A.C. 838, 845, says: "Whether, in a case of this character" (a crossing case) "the plaintiff's negligence was the sole cause of his own misfortune, or whether he was guilty of contributory negligence, are questions of fact to be decided in each case on the facts proved in that case."

Lord Sumner in *Rex v. Broad*, [1915] A.C. 1110, gives an explanation of why this must be so. He speaks (p. 1114) of the position of the driver of a railway engine and a motor-cyclist at a crossing as that "of persons using a highway in common, who come swiftly and unexpectedly upon one another at a point where, in a greater or less degree, each may expect to meet other persons and must therefore use reasonable care to announce his approach, and to keep out of their way." "The fact" (he adds) "that one ran upon rails while the other used the ordinary road surface, and that one was only crossing the highway transversely instead of proceeding along it lengthwise, cannot make the position a different one in point of law."

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Without multiplying authorities I may also refer to *Grand Trunk R.W. Co. v. Hainer*, 36 S.C.R. 180, and to the rule as stated by Mulock, C.J., speaking for the Appellate Division, in *Ramsay v. Toronto R.W. Co.*, 30 O.L.R. 127, at pp. 141, 142: "The duty of a person about to cross a railway track is not to be guilty of negligence, which is another way of saying that he must exercise reasonable care. In each case what is reasonable care is a question to be decided by the jury, according to the facts of the case."

The facts of this case as presented to the jury were that the appellant said that, when driving along the stone-road, he did not see the car nor its lights, and that, when he turned, he did not hear the car nor see either the car or its head-light. The direction of his gaze is somewhat indicated by the position of the waiting shed, the outline of which he did see. That stands across the track, and is not at all in the direction from which the car would approach. Evidence was given that the appellant, while on the stone-road, passed the car and turned to cross ahead of it; that its inside lights were visible; and it was suggested that the noise of the motor drowned the sound of the approaching car. On the question of the head-light, 2 or 3 witnesses gave positive testimony as to its being bright; one Crain was in the car and saw the appellant on the stone-road by its light, and others who boarded the car a short time before noticed the light. The night was dark and the appellant muffled up.

Under these circumstances, the jury may well have thought that looking was not enough, and that, on a dark night, at a dangerous crossing, necessitating a wide curve to negotiate it, reasonable care demanded a stop, as listening might be useless if the motor was in motion.

The answers must be viewed in the light of the circumstances as presented to the jury. Their finding that the appellant did not use enough care and should have stopped dead at a dangerous crossing indicates that they fully appreciated the circumstances which apparently to their minds demanded something more than what was done.

This is sufficient to dispose of the case. Otherwise there would be great difficulty in upholding the answer of the jury that the respondents were guilty of negligence in that there was no

light in front of the car at the time of the accident. This, unless read as limited to the very time of collision, as it is literally expressed, would be a finding in the teeth of 3 witnesses at least, in addition to the motorman—all independent—one of whom saw the light and by it identified the appellant's car on the stone-road, and the other two who boarded the car about a mile away and saw the head-light then burning brightly. There is no positive evidence that it was not lit—nothing except by the appellant and others who did not see its light. If the light went out just before the collision, there is nothing to make that negligence on the part of the respondents.

I would dismiss the appeal.

*Appeal dismissed with costs.*

[APPELLATE DIVISION.]

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*Master and Servant—Injury to Farm Labourer—Defective Condition of Appliances—Findings of Jury—Negligence—Contributory Negligence—Judge's Charge—Nondirection—Duty of Master—Employment of Competent Workmen—Independent Contractor—Objections not Raised at Trial, Urged upon Appeal—Costs—Damages—Prejudice.*

The plaintiff was employed by the defendant as a farm labourer, and was, in the course of his employment, on the top of a silo. A plank which had been placed there by B., who had previously worked for the defendant, slipped when the plaintiff was upon it, and the plaintiff fell to the ground and was injured. In an action to recover damages for the injuries, the jury found that the defendant was guilty of negligence which caused the accident, that the negligence consisted in not having the plank properly secured, and that the plaintiff was not guilty of any negligence which caused or contributed to the accident:—

*Held*, that the question whether the defendant did all that should be expected from a reasonably careful and prudent employer of labour to avoid the danger, or to discover the danger and remedy it, was not fully and adequately placed before the jury by the trial Judge in his charge; and there should be a new trial (HODGINS, J.A., dissenting on the ground that where the jury by their answer define the negligent act the Court is bound to decide whether it amounts to negligence in law, and it is not necessary that the jury should have been fully instructed upon the law of negligence.)

The duty which a master owes to his servants with regard to the place in which and the appliances with which they are called upon to do their work, considered, with references to authorities.

*Junior v. International Hotel Co. Limited* (1914), 32 O.L.R. 399, 408, 409, specially referred to.

*Held*, also, that, although the defendant did not, at the trial, object to the charge or ask the Judge to direct the attention of the jury to the defence that the defendant, having employed competent workmen, and being him-



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self innocent of any neglect or default, was relieved from responsibility, he should not be debarred from objecting and urging this defence upon the appeal; but he should not be allowed the costs of the appeal against the plaintiff.

*Per HODGINS, J.A.*:—There was no foundation for the suggestion that the defendant engaged B. as an independent contractor, and was therefore not liable for B.'s neglect to make the plank secure. There should not be a new trial of the whole action; but, by reason of something which occurred at the trial which might have prejudiced the minds of the jurors against the defendant, there should be a new assessment of damages.

THE following statement of facts is taken from the judgment of FERGUSON, J.A.:—

Appeal by the defendant from a judgment of the Chief Justice of the Exchequer, upon the findings of a jury, in favour of the plaintiff, for the recovery of \$4,000 damages with costs, in an action for injuries sustained by the plaintiff while employed as a farm labourer on the defendant's farm; his work at the time of the accident being to attach certain ropes to a pulley fixed to the joist of the roof of a silo, the pulley and ropes being necessary to the use and operation of the pipes by which the corn is carried from the cutting box to and spread in the silo. The accident occurred on the 6th October, 1916.

The action was tried at Kitchener on the 2nd November, 1917, judgment being pronounced at the conclusion of the trial.

The questions left to the jury and their answers were as follows:—

"1. Was the defendant guilty of any negligence which caused the accident? A. Yes.

"2. If yes, then what did such negligence consist of? A. Of not having the plank properly secured.

3. Was the plaintiff guilty of any negligence which caused or contributed to the accident? No.

"4. (Requires no answer).

"5. What damage, if any, do you award the plaintiff? A. \$4,000."

On the 5th October, 1916, the defendant engaged the plaintiff to work on his farm as a labourer; the term of employment to commence the next day.

On the morning of the 6th, the plaintiff presented himself at the defendant's farm, and the following conversation took place:—

"Mr. Taylor said to me, 'What do you want to do, Bert?' I said, 'I want to go in the field.' He said, 'Will you mind putting

those pipes up?" I said, 'I pulled off for two or three days, I want to go in the field.' He said, 'Will you mind fixing those pipes for me and pulling off till Mr. Horton comes?' I said, 'All right.' "

The pulling off there referred to means pulling corn away from the cutting box. The pipes referred to were the pipes leading from the cutting box to the silo.

The silo was built of concrete, circular in form, 12 feet in diameter, and 35 feet high. A dormer window  $2\frac{1}{2}$  feet high by 2 feet wide was placed in the roof, for the purpose of permitting entrance at the top of the silo to fill it, and of placing, joining, and equipping the inside and outside pipes, which are only connected while the silo is being filled. The outside pipe of the silo is a fixture, while the inside pipe is not, but it is necessary each year when filling the silo to connect the two at or near the inside of the dormer window, and in doing so, and to permit the moving of the inside pipe about during the process of filling, it is necessary to draw up the inside pipe by attaching ropes to the pulley fixed to the roof. This pulley is situated about 4 feet 11 inches from the sill of the dormer window.

The plaintiff's testimony is that, acting upon the defendant's request, he proceeded to his work by way of the ladder affixed to the outside of the silo; that, when he arrived at the top and looked through the window, he saw a plank across the concrete top of the silo, about 3 feet out from the window; he also saw the pulley. The plaintiff describes the further happenings in these words:—

"I put my hand out and felt the plank and pulled it and I said to Fitzgerald (who was at the bottom of the silo), 'Is this plank safe?' " (Fitzgerald's answer is not given in evidence).

"Q. You say you took hold of the plank? A. Yes, took hold of the plank.

"Q. Did or did not the plank move in? A. Didn't move at all.

"Q. Then what did you do? A. I crawled in on to the plank, and I put the one end of the rope through the pulley and let the other end down to Fitzgerald to tie the rope on to the pipes. I didn't like to stay on the plank and put all my weight on while pulling up the pipes because I had to pull all myself, so I got out on the ladder, where I would have a good hold, and I pulled the pipes to the top. Then, as another rope was tied to the top of the pipes for me to put through the pulley to make the pipes

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fast, as I was getting in, just put my hands, hardly got inside when the plank slipped and let me down . . . I had my hands on the plank and might have just left the wall, the doorway, to crawl in on to the plank . . . I put nearly all my weight on with the hands and pulled my body over to the plank . . . practically lying down . . . I hadn't room to get through the window and stand up there.

"Q. Then you say that just as you were getting on the plank the plank slipped? A. Slipped.

"Q. Slipped from where? A. Off the wall. . . .

"Q. And I suppose you and the plank went down 35 feet? A. Yes, I went down all right. . . .

"Q. What do you say as to the arrangement on the inside of the silo, having regard to this plank? A. The plank should have been nailed and fixed properly.

"Q. Was it possible to have nailed it? A. Yes, sir."

In cross-examination, at p. 10, the plaintiff states that he has been in the country for about five years; that farming is his usual occupation; that he had helped to fill other silos and had helped attach other silo pipes; that he had once before worked for the defendant three part of a day, but he had not previously been in the silo (p. 12).

The defendant in his evidence, pp. 78, 79, 80, and 81, says:—

"Q. You are the defendant, Mr. Taylor? A. Yes, sir.

"Q. And the silo was built for you by some other man? A. Yes.

"Q. And the roof put on by Mr. Ruddell? A. Yes.

"Q. Now you hired the plaintiff the day before? A. Yes, sir.

"Q. And, as he said, to fill this silo? A. Yes.

"Q. And I understand there is a slight difference in what occurred in the morning when he came there. Tell what happened. A. When he was coming in the gate, I asked if he would put them pipes up; he said, 'Yes,' and he went up. If he hadn't come along, I was going to do it myself.

"Q. Were you there waiting at the time to do it? A. Yes.

"Q. He went on up? A. He went up.

"Q. You knew or did you know he had been doing similar work before? A. Yes, sir.

"Q. And he had worked for you before around the farm generally? A. Yes.



"Q. Then you weren't present at the time of the accident at all? A. No, I was at other work.

"Q. When you told him to go up there, was there present to your mind the fact that there was a plank or board and plank up there? A. Yes; I didn't think much about it; it was put up a year ago, and I never paid much attention.

"Q. It wasn't present to your mind? A. No.

"Q. You knew it had been there? A. Yes.

"Q. Who put it there? A. Mr. Bond.

"Q. Did you tell him to put it there? A. No, I just asked him the same as Mr. Goodwin to put the pipes up.

"His Lordship: Whose plank was it? A. It was my plank.

"Mr. Kerwin: How did he get it? A. I can't tell how he got it.

"Q. You weren't there? A. No.

"Q. And you didn't give it to him? A. No, I didn't give it to him.

"Q. It came off your place? A. Yes.

"Q. When did Bond put it there? A. In 1915, I believe.

"Q. Is there a window in your door at the top of the silo? A. No; it is open all the time.

"Q. Had you been up in the silo from the time Bond had been working around there until after the accident? A. No, not to the top of the silo.

"Q. You had been in it of course? Yes, but not to the top.

"His Lordship: That is for a year? A. For a year.

"Mr. Kerwin: You had nothing to take you up there? A. No reason to go up whatever."

*Cross-examination by Mr. Secord:—*

"Q. Mr. Bond was just at your place casually? A. Yes.

"Q. Came there for the purpose of helping you around your farm to fill the silo? A. Yes, to fill the silo.

"Q. And you didn't engage him for the purpose of fixing any board or anything? A. No, not that I know of.

"Q. Did you help to put the pulley up? A. Yes, I helped to put the pulley up.

"Q. And at that time you didn't take the trouble to put in any plank? A. No.

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"Q. Therefore it was no protection for the man? A. No.

"Q. And you knew and realised what was to be done with the pulley? A. Yes, partly.

"Q. That must be to go up with a rope and put it through the pulley and pull the pipes up and tie them? You realised that when you put it up? A. I realised the pipes had to be put up, and that is the way they had to be put up, I believe.

"Q. And knew the distance from the door to the pulley? A. No.

"Q. Didn't you take any pains in that connection? A. Didn't ever measure.

"Q. You knew when you were there and helping to put the pulley up? A. I didn't go to the top to help put the pulley up.

"Q. You knew it had been put up? A. Yes, I knew it had been put up.

"Q. And no place to put it except where it was put—it had to be put that distance away to take care of the pipes? A. It had to be there to take care of the pipes—and that distance.

"Q. You knew that because you saw Mr. Fitzgerald's silo. A. Yes, I was over looking at Fitzgerald's silo.

"Q. This was a new process around where you were in the year 1915? A. Yes, sir.

"Q. Distributing by the pipes? A. Yes.

"Q. And you saw the same plank over at Fitzgerald's? A. No; I don't think I went into Fitzgerald's silo.

"Q. If you didn't go up, you didn't see it? A. No.

"Q. But you saw the pulley? A. I don't know that I seen the pulley.

"Q. I thought you told us a moment ago you went to see how Fitzgerald had his up? A. Yes; I had a man with me who was supposed to understand it.

"His Lordship: Did you know the plank was there on the plate of the silo? A. I didn't know how Bond put the plank on.

"Q. You knew he put the plank on? A. Yes, I knew he put the plank on.

"Q. For what purpose, do you know? A. I wasn't there when he put it up.

"Q. He didn't put it for the workmen? A. No.

"Q. You knew he put the plank up in 1915? A. Yes.

"Q. Didn't you inform yourself why he put it there? A. I never went up in the silo; it is a pretty hard place to get into.

"Q. Did you not know why he put it there? A. I supposed he put it there to help him.

"Q. Help what? A. Help Mr. Bond.

"Q. To do what? To put that rope through the pulley? A. Yes, sir.

"Q. To tie the inside pipe to it, you supposed he put it up there on that occasion for that purpose? A. Yes, sir.

"Q. Then you allowed it to remain there? A. I allowed it to remain there.

"Q. What part had the plank to play in the plaintiff tying the rope? A. Well, I wasn't there; I suppose he must have put his feet on, by what evidence he gave, to go to the top of the silo.

"Q. He told you of having put the plank there, didn't he? A. I don't know as he did.

"Q. Why did you leave it there? A. I can't tell you why it was left there."

In his examination for discovery, read at the trial, the defendant says that Bond, who placed the plank, was a carpenter, and, so far as he knew, a competent man.

The plaintiff in his statement of claim alleges the defendant's neglect in these words:—

"The plaintiff says his fall was occasioned by the neglect of the defendant to provide proper planking at the top of the silo properly secured for the purpose of carrying the weight of a man required to be thereon; that the boards provided by the defendant for the plaintiff to sit upon . . . were not nailed or in any way securely fastened to the silo."

The defendant denies these allegations, pleads contributory negligence, and also by paragraph 4 of his defence pleads:—

"The defendant further says that the said silo was constructed and the said planking placed thereon by competent workmen employed for that purpose, and the defendant was not guilty of any neglect or default in respect thereof, even if the said planking subsequently proved unsafe or insufficient, which the defendant does not admit."

Dealing with the question of the duty of the defendant to the plaintiff, the learned trial Judge instructed the jury as follows:—

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"Now at common law . . . a master owes some duty to his servant; he must supply the servant with reasonably safe premises with which to carry on the work and with reasonably safe appliances with which to carry on the work, and the conditions under which the operations are to be performed under the directions of the master must be reasonably safe in order that the servant will not be unnecessarily exposed to risk or danger. . . . If the master knows of some risk, or ought to know of some risk, not one incident to the business, but some difficulty that the master knows about in the appliances or in the premises, it is his duty to warn his servant, so that the servant shall not be unnecessarily exposed to danger. . . . The plaintiff, in the discharge of his duty and at his master's bidding . . . goes up there, and it is not in controversy that he fell inside the silo, because of the plank on which he was resting for a moment giving away, either by breaking in the centre, or one end slipping off the plate on top of the silo. . . . The accident was caused, therefore, by one of two of those things, either the plank wasn't strong enough to support him or it was insecure and slipped and caused him to fall . . . It would be the duty of the master if the plaintiff had to use the plank . . . to see that the plank was reasonably safe. If he failed to see that it was reasonably safe . . . the defendant would be liable for negligence; and in like manner if that plank slipped and in that way caused the accident. If under the circumstances it was reasonable for the plaintiff to have endeavoured to get on that plank to carry out his master's orders, then the master will be guilty of negligence—and if you find that the plank wasn't reasonably secure and was capable of being secured. . . . If he (the defendant) thought of it at all, he knew the plank was there when the plaintiff went up at his bidding. He knew or had a right to assume that the plank in its position would act as an invitation to this plaintiff to make use of it for the purpose of doing the work which he had gone up to do. . . . What should the defendant have done to have prevented the plank from slipping off the plate? Could he by any reasonable means have made the plank safe from slipping? If he could, by the exercise of reasonable care, as for example by nailing, and I suppose two or three nails would have prevented the slipping, if by the exercise of reasonable care he could have made it safe from slipping, that as a matter

of fact was his duty to have done. If it was impossible, that is another matter, but if it was reasonably possible then it ought to have been done. . . . It is the duty of the master frequently to inspect the premises where his work is being carried on. . . . The master, Mr. Taylor, unfortunately never went up for a year at least to look at conditions. Perhaps a year before other people were on that plank and it gradually lost its hold. . . . Do you think a man's life should be exposed to such a danger as that? Is that an ordinary risk incident to the filling of the silo, that that plank should be put in that position, left there not spiked, not secured, and that this man should be sent up there to do that work under conditions that would naturally invite him to make use of that plank? . . . ."

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April 15. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*Hugh Guthrie*, K.C., S.-G. Can., for the appellant, the defendant, argued that he had nothing to do with the placing of the plank, the slipping of which caused the accident, nor was the plank a part of the construction of the silo. The plank was placed where it was by the carpenter for his own convenience; and, if there was negligence on his part in doing so, the appellant was not liable for it, as he did all that he was called upon to do, in employing a competent man to do the work, and supplying him with proper materials and appliances: *Junor v. International Hotel Co. Limited* (1914), 32 O.L.R. 399, 408, following *Smith v. Baker & Sons*, [1891] A.C. 325; *Lovegrove v. London Brighton and South Coast R. W. Co.* (1864), 16 C.B.N.S. 669. No attempt was made to shew that the defendant had employed an incompetent workman. The damages were grossly excessive, and in this respect the defendant was prejudiced by the improper question raised at the trial as to his financial position. Reference was also made to *Myers v. Sault Ste. Marie Pulp and Paper Co.* (1902), 3 O.L.R. 600; *Laird v. Taxicabs Limited* (1914), 6 O.W.N. 505.

*M. A. Secord*, K.C., for the respondent, the plaintiff, argued that no attempt had been made to magnify the damages unduly. The plaintiff had been exceedingly candid in his statements as to the extent of his injuries, and the defendant had been in no way prejudiced by any remarks of the learned Judge who tried the case.

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There was nothing to warrant any interference with the verdict of the jury. Reference was made to *Canadian Pacific R.W. Co. v. Jackson* (1915), 52 S.C.R. 281, 286, as being conclusive on the question of damages; also to *Bradenburg v. Ottawa Electric R.W. Co.* (1909), 19 O.L.R. 34.

*Guthrie*, in reply, argued that the *Jackson* case was not an authority against the appellant. There was no evidence that the system of construction was defective.

May 17. FERGUSON, J.A. (after setting out the facts as above):—Counsel for the appellant contends that the learned trial Judge in effect instructed the jury that the law imposed an absolute duty upon the master to supply his servant with reasonably safe premises, and that to that extent the master was an insurer of his servant's safety, and contends that such instruction is in law improper and insufficient, in that all that is required of a master is to *exercise such ordinary care and diligence as may be reasonably necessary to provide safe premises and proper appliances so as not to subject his servant to unnecessary risk*. Counsel further contended that it is not the duty of the master to do personally the work connected with his business, but that he may select proper and competent persons to do it; and, if he supplies them with materials and resources for the work, he has done his duty to his servant; and that in the case at bar it was established that Bond, the workman and carpenter who did the work, was competent; and that, even if Bond was negligent in not nailing the plank, the defendant is not responsible, but is entitled to succeed on the plea stated in the 4th paragraph of his defence.

The duty that a master owes to his servants with regard to the place in which and the appliances with which they are called upon to do their work was considered by this Court in *Junor v. International Hotel Co. Limited*, 32 O.L.R. 399. In that case, at pp. 408 and 409, Meredith, C.J.O., in delivering the opinion of the majority of the Court, says (p. 409):—

“It is a startling and to me a novel proposition that a householder who employs a competent plumber and steam-fitter to make a connection between his furnace and his kitchen does so at the peril of being answerable for any injury that may be occasioned to his servants owing to the neglect of the plumber and steam-



fitter to provide some safety device which he erroneously believes to be quite unnecessary—at all events, unless the householder knows or ought to know of the defect.”

And (p. 408): “It will be well at the outset to ascertain what duty a master owes to his servants with regard to the place in which and the appliances with which they are called upon to do their work. The nature and extent of that duty has been expressed in different language by different Judges; but, when their statements are read in the light of the particular circumstances of the cases they were dealing with, they do not differ from the statement of Lord Herschell in *Smith v. Baker & Sons*, [1891] A.C. 325, 362, which is: ‘It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.’ See also Halsbury’s Laws of England, vol. 20, para. 234, pp. 119, 120.”

In Beven on Negligence, Canadian ed., p. 613, the learned author states the duty as follows:—

“The principle established by these cases is that when a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks.”

In *Wilson v. Merry* (1868), L.R. 1 H.L. Sc. 326, the Lord Chancellor, at p. 332 of the report, states the duty in these words:—

“What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen.

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As was said in the case of *Tarrant v. Webb* (1856), 25 L.J. N.S. 261, 263, negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants."

In *Cole v. DeTrafford*, [1918] 1 K.B. 352, 355, Lawrence, J., discussing the judgment appealed from, says:—

"I think the learned Judge correctly held that duty as being to take reasonable care to maintain the premises in a condition free from any concealed danger of which she was aware or ought to have been aware."

From these authorities it is clear that the master is not an insurer of his servant's safety, but is only required to exercise such ordinary care and diligence as may be reasonable in view of the work performed, and the danger incident to the employment, and in view of the surrounding conditions and circumstances.

On a careful consideration of the charge in the light of these authorities, it appears to me that the learned trial Judge did not sufficiently explain and point out to the jury the exact duty of the master, and that he did not deal with the questions raised by the 4th paragraph of the defence, in such a way as adequately to draw them to the attention of the jury in order that they might be considered and passed upon by the jury in arriving at a conclusion as to whether the defendant was or was not negligent.

The measure of the defendant's duty to the plaintiff is to be fixed by ascertaining what a reasonably careful and competent master would, under like circumstances, have done to provide the plaintiff with safe premises and appliances. Should the defendant have employed a more competent man than Bond to erect and nail the plank? Was Bond a competent person, or such a person that the defendant was entitled to assume that he did his work properly, and that, when he put a plank in place, he did all that was reasonably necessary to keep it in place? Or was there any knowledge or thing connected with Bond or the doing of his work and the placing of that plank that would raise a suspicion in the mind of a reasonably careful employer of labour, requiring him to make an inspection to ascertain for himself whether or not the plank was safely fastened? Or, in other words, should or ought the defendant, acting as a reasonably careful master, in the cir-

cumstances of this case, to have made an inspection, and would such inspection have uncovered and cured the defect?

The plaintiff says he tried the plank and was satisfied it was secure; and, as the evidence now stands, it is not shewn why, on an inspection by the defendant, more would probably have been discovered than was ascertained by the plaintiff.

These seem to me to be questions which were not, but which should have been, submitted to the jury for consideration. There was no real dispute as to the condition of the premises. The real issue between the parties to this action was as to whether or not the master had taken reasonable precautions to prevent that condition, and as to whether or not the plaintiff was guilty of contributory negligence. The question of contributory negligence seems to me to have been placed before the jury fully and fairly, but the question as to whether the master did all that should be expected from a reasonably careful and prudent employer of labour to avoid the danger, or to discover the danger and remedy it, was not, I think, in the charge of the learned trial Judge, fully and adequately placed before the jury for their consideration.

For these reasons, I am of the opinion that there should be a new trial, and that it is not necessary for me to discuss the objections taken to the charge of the learned trial Judge on the question of damages. The verdict of \$4,000, in the circumstances of the case, appears large, and the damages may have been aggravated by reason of the matters complained of, but I refrain from expressing any opinion thereon.

A question was raised as to whether or not Bond and the plaintiff had both been engaged as farm labourers for the defendant, and were consequently fellow-servants. I do not think that the evidence establishes the exact nature of Bond's employment, so as to enable us to pass upon that question.

Counsel for the defendant did not, at the trial, object to the charge of the learned trial Judge, or request him to direct the jury on the questions raised by the 4th paragraph of the defendant's pleading and in his argument on the appeal. The defendant should not, for that reason, be deprived of the benefit of his plea or of these defences. However, had counsel objected at the trial, or requested the learned trial Judge to instruct the jury on the questions discussed before us, this appeal would probably have

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been unnecessary; and, for that reason, I think that, while the appellant succeeds, he should not be awarded the costs of the appeal.

I would, for these reasons, allow the appeal without costs, and direct a new trial; costs of the former trial to be costs in the cause.

MACLAREN and MAGEE, J.J.A., agreed with FERGUSON, J.A.

HODGINS, J.A.:—The appellant employed the respondent to connect the pipe inside the top of the silo on his farm with that from the outside in order to enable the silo to be filled. It is a difficult job to attach these pipes which have to be put together at the top of the silo 35 feet above the ground.

In 1915, a man named Bond was employed by the appellant to fill the silo. He took up a board when he went to connect the pipes, and left it there, not fastened but resting on the top of the wall inside the roof. He was not engaged to put the board there nor to fasten it; in fact it was his own idea, and not within the appellant's instructions nor in his mind. The appellant did not give him the board, was not there when he used it, and did not know how he got it.

The appellant, however, knew of it, and supposed Bond had used it to help him, but never inspected it nor went up to see it, and cannot tell why it was left there.

I see no foundation on these facts for the suggestion that the appellant engaged Bond as an independent contractor, and is therefore not liable for his neglect in not making the plank secure. The reason why a principal escapes liability when he has employed another man is that his duty to take reasonable care to make his premises safe can, and indeed in most instances must, from the nature of the case, be discharged by another, and if that other is selected to do and is competent to do properly the thing that, if the principal did, he could only do in the same way, the law accepts his ability to perform the duty as a sufficient discharge of the principal's obligation. But this immunity is necessarily limited to cases where the principal does actually delegate the performance of the duty to a competent contractor, and cannot be extended to cases where the principal never intended to do nor instructed to be done, nor knew of, the thing that was done, until it was performed.

Here Bond was to fill the silo, not to make it a safe place for others. The appellant's duty, whatever it was, was not to be performed, nor was it performed, by Bond in taking up a plank as part of his outfit when filling the silo. So that it is quite impossible to put Bond in the position of an independent contractor, when neither he nor his employer intended that he should occupy that position, and where the work he was employed to do was not done in discharge of his principal's duty to make his premises safe, but in pursuance of a totally different task.

Objection was made that the learned trial Judge laid down the law too broadly as to the appellant's liability, and that the jury should have been asked to find whether the appellant knew or ought to have known that his premises were unsafe. But I do not see that the objection is a valid one, where, as here, the appellant never inspected at all, after he knew that the plank was there. The place had been finished under competent supervision and the pipes installed without any plank. A change had therefore occurred in the equipment of the silo, and in a place where dangerous work was necessary, and that threw upon him a clear responsibility, when he employed the respondent, as to the condition of his premises. The jury have found that the appellant was negligent in that he did not have the plank properly secured. He did know of the plank, and he did not inspect, and it proved unsafe; what more is needed? As to the respondent, here the duty of the employer first arose as to the safety of his premises when he employed the respondent. He took no precaution at all, and I can see nothing in dispute to leave to the jury. The appellant took his chances of the premises being safe and cannot complain of the result.

This Court can say whether that finding establishes sufficient negligence to make the appellant liable. If it does not, then he escapes; but, if it does, he is responsible. The Judicial Committee have laid down the limits of responsibility for plant in these words: "The master does not warrant the plant, and if there is a latent defect which could not be detected by reasonable examination, or if in the course of working plant becomes defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable." *Toronto Power Co. v. Paskwan*, [1915] A.C. 734, 738.

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Where a jury put their finger upon the exact thing which a man should do, the Court is bound, I think, to decide whether, under the circumstances in evidence as to which no dispute exists, that is negligence in law, and it is not necessary to instruct the jury as to the whole law of negligence as if their verdict were to be a general one.

The taking of reasonable care to provide proper appliances and to maintain them in a proper condition is a duty imposed upon an employer; and, if the answer of the jury, defining what they consider to be negligence, indicates something lying outside of that line of duty, the Court must set aside their answer; but, if their definition of negligence involves disregard of the duty imposed, it would be wrong, I think, to disregard it because the learned trial Judge has failed to discuss with fullness the law of negligence from that particular point of view.

I would, therefore, be disposed to dismiss the appeal, but for one circumstance which, to my mind, worked or may well have worked a hardship on the appellant. After a very careful charge by the learned trial Judge, one of the jurors asked a question in the following words, "Has Mr. Taylor refused to meet the plaintiff?" And a discussion took place in the presence of the jury, the learned trial Judge winding up the discussion by saying that the jury might be quite sure that the case had not come into Court until the other methods had failed. After the retirement of the jury, they returned late at night, and the foreman asked the following question: "Can we be told the situation of the farmer, so far as his financial condition is concerned?" And the learned trial Judge then said: "I don't know whether his solicitor would care to give any information on that point. I can ascertain. You will have an opportunity in the morning. His counsel may be able to get you the information; and, if there is no objection on the part of the counsel for the plaintiff, I will allow the information to be given, but otherwise it really is not evidence."

On the following morning, after discussion between the Court and counsel, but not in the presence of the jury, the learned trial Judge recalled the jury and made the following statement to them: "When the Court had adjourned last night, you asked me a question and I have considered it since. You wanted to know what the means of the defendant were. I have been considering that



question, and I have reached the conclusion that the information is not evidence, and the jury must not consider that."

While what I have just quoted states the law exactly and puts the responsibility on the Court, yet it may not have removed the impression created by what took place the night before.

The broad fact still remains that the jury had asked for the information; and, when it was not furnished, they may well have thought that the defendant was of such means as to prefer not to state his condition, and that if he were a poor man he would gladly let the jury know that fact.

Whether that had any effect on the amount of the verdict I am unable to say, but I cannot rid my mind of the feeling that what occurred in the evening may have been considered as a sort of half promise that they would have the information unless there was an objection from counsel, and have led the jury to think that counsel had objected. This would, if I am correct, put the appellant in a position of prejudice. In nothing should the Court be more careful than in eliminating every element tending to inflate or reduce the damages unless strictly admissible; and the jury, by their early question, indicated a possible dissatisfaction with the appellant which this last episode might aggravate.

Under the circumstances, I think there ought to be a new trial, confined to an assessment of damages; costs of the former trial and of the new trial to be costs in the cause.

*Appeal allowed and new trial directed;  
HODGINS, J.A., dissenting.*

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[APPELLATE DIVISION.]

May 17.

DOWSON V. TORONTO AND YORK RADIAL R.W. Co.

*Street Railway—Injury to Passenger Alighting from Street-car—Negligence—Trial—Finding of Jury—Explanation—Reconsideration—Substituted Finding—Acceptance by Trial Judge—Dangerous Place to Alight—Step of Car too Far from Ground—Order of Ontario Railway and Municipal Board—Non-compliance with—Platform Placed on Highway by City Corporation—Duty of Company—Neglect—Proximate Cause of Injury.*

In an action for damages for injury sustained by a woman, one of the plaintiffs, in alighting from a closed double truck street-car of the defendants, upon a city highway, the jury, in answer to questions, found: (1) that the accident was caused by the negligence of the defendants; (2) that the negligence consisted in not furnishing proper platform accommodation for the purpose of getting on and off the defendants' cars; and (3) no contributory negligence. After a discussion between the trial Judge and the jurors in regard to the second finding, the trial Judge sent the jury back to reconsider that finding. When the jury returned, they stated that for the second finding they had substituted the following: "We find that the north end of the car-step was sufficiently shot past the north end of the platform to render it positively dangerous to passengers alighting. We also find that the height of the car-steps did not comply with the regulations of the Ontario Railway and Municipal Board, and that these circumstances caused the accident:"—

*Held*, that the trial Judge properly accepted and acted upon the substituted answer to question 2.

*Townsend's Auto Livery v. Thornton* (1917), 13 O.W.N. 237, followed.

By order of the Board, which had the force of a statute, it was directed that on closed double truck cars the height of the first step above the ground should be not less than 14 inches nor more than 16 inches. Upon the car from which the plaintiff alighted, the step was 21 inches above the platform at which the car purported to stop and 33 inches above the ground at the place where the car overshot the platform and where the plaintiff alighted. It appeared that the platform had been erected and the stopping place fixed by the city corporation:—

*Held*, that, by force of the statute under which the defendants operated and the order of the Board, which had the duty of the defendants to see that the proper facilities for passengers to alight were provided—not a platform, but a step upon the car of the prescribed distance above the ground; they did not provide such a step; the place was dangerous; and, the jury having found the danger and the neglect to provide the step, and that these were the proximate cause of the accident, judgment was properly entered for the plaintiffs.

The question whether the order was unreasonable or impossible to comply with was not open.

Judgment of LATCHFORD, J., affirmed.

AN appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiffs, for the recovery of \$2,901.55 and costs in an action for damages for personal injuries sustained by the plaintiff G. G. Dowson in alighting from a car of the defendants at the corner of Heath and Yonge streets, in the city of Toronto, by reason, as the plaintiffs alleged, of the negligence of the defendants' servants in charge of

the car, and for moneys necessarily expended and loss suffered by the plaintiff E. C. H. Dowson, husband of the plaintiff G. G. Dowson, in consequence of her injuries.

April 19. The appeal was heard by MACLAREN and MAGEE, J.J.A., KELLY, J., and FERGUSON, J.A.

*D. L. McCarthy*, K.C., for the appellants. The evidence shews that the female plaintiff "took a chance" and let herself go. The jury have not found that the defendants were negligent in failing to warn her. The platform was not placed where it was by the defendants, who had no power to erect a platform there, but by the Corporation of the City of Toronto; and, if there was negligence in not providing proper platform accommodation, it was not the fault of the defendants. The order of the Municipal Board was one which it was impossible for the defendants to comply with. The negligence found by the jury was not the proximate cause of the accident. He referred to *Rickards v. Lothian*, [1913] A.C. 263.

*R. H. Parmenter*, for the respondents, the plaintiffs, argued that there was no evidence that the city corporation had put the platform where it was. The jury accepted the injured plaintiff's account of the accident and exonerated her from any charge of contributory negligence. The whole course of proceeding of the defendants was negligent. They did not stop at a proper place, but at a place which was a veritable trap, and the employees offered the plaintiff no assistance. He referred to *Gazey v. Toronto R.W. Co.* (1917), 40 O.L.R. 449, *per* Ferguson, J.A., at p. 460; *Tinsley v. Toronto R.W. Co.* (1908), 17 O.L.R. 74; *Toronto R.W. Co. v. King*, [1908] A.C. 260; *Gray v. Wabash R.R. Co.* (1916), 35 O.L.R. 510, 28 D.L.R. 244; *Townsend's Auto Livery v. Thornton* (1917), 13 O.W.N. 237; *Herron v. Toronto R.W. Co.* (1913), 28 O.L.R. 59, 6 D.L.R. 215.

*McCarthy*, in reply.

May 17. The judgment of the Court was read by FERGUSON, J.A.:—This is an appeal by the defendants from a judgment pronounced by Latchford, J., on the 23rd January, 1918, whereby, on the findings of the jury, judgment was directed to be entered for the plaintiff G. G. Dowson for \$2,500 and for the plaintiff E. C. H. Dowson for \$401.55 with costs. The plaintiffs are husband and wife.

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The action is for damages for injuries sustained by Mrs. G. G. Dowson in alighting from the defendants' street-car on Yonge street, near Heath street. The accident occurred on the 1st November, 1916, about 7 o'clock in the evening, and it is alleged that the accident was caused by the defendants inviting the female plaintiff to alight from their car at a place known to them to be dangerous and unsafe, and where the step of the car was more than 30 inches above the ground; and that the plaintiff, without negligence on her part, in attempting to alight at this place, fell and sustained the injuries complained of.

The grounds of appeal are: that the learned trial Judge erred in not accepting the first answer of the jury to question 2; that the learned trial Judge should not have sent the jury back to reconsider their answer to that question; and that their substituted answer should not have been given effect to by the trial Judge, and should not affect this Court's decision on the appeal.

The result of the appeal turns on the effect to be given to the answers of the jury, and on the propriety of the conduct of the learned trial Judge in asking the jury to explain their first answer to the second question, and instructing them to retire and reconsider it. I quote, therefore, the answers and discussions from pp. 141 to 144 of the evidence:—

At the opening of Court the jury brought in the following answers to the questions:—

1. Was the accident to Mrs. Dowson caused by the negligence of the defendants? A. Yes.

2. If so, in what did such negligence consist? A. In not furnishing proper platform accommodation for the purpose of getting on and off their cars.

3. Could Mrs. Dowson, by the exercise of reasonable care, have avoided the accident? A. No.

4. If so, in what did the want of reasonable care consist? (No answer.)

5. By reason of the accident, what damages were sustained: (a) by Mrs. Dowson? A. \$2,500. (b) By her husband? A. \$401.55.

His Lordship: Coming back to your answer to question 2, it may be that I did not make that matter clear to you in my address. You may have forgotten that during Mr. McCarthy's address to

you, when he was dwelling on the point that you have here referred to, I stated to him, and, as I thought, to you, that that was not a matter with which he need concern himself, as the platform, if by platform is meant the little plank construction that has been made across the ditch, was not made by these defendants. It was put there by the City of Toronto; and, if your answer had reference to that, I would ask you to reconsider the matter, because that is not a matter for which these defendants are in any way chargeable, in my view of the case. They have not provided that platform, if by platform you mean the little gangway.

Juror: We took that into consideration, that they had not furnished even footing of any kind, that is, reasonable footing, whether it be a platform or whether it be the ground. We thought if they had furnished, we will say, a space of any kind that was level, we did not consider that they had done that. As we see it, the step projecting——

His Lordship: You have not said so. There was an important issue about that between the plaintiff and the defendants, to which I thought I addressed myself in speaking to you, but you have not made any finding upon that.

Juror: We decided that, had the platform been long enough to extend as far as their step that was on the car, which we found that it did not, that there would not have been any chance for a person to get their foot off the step.

His Lordship: That is quite true, but that is not the point of negligence to which I directed your attention, but rather as to whether it was or was not the fact that that car-step projected as far beyond the existing platform as Mr. Dowson alleged, or whether the step projected only so far as the defendants allege, that is, but from 7 to 9 or 11 inches. That is an important matter, and I should ask you to reconsider these questions, and retire if necessary.

Juror: Their step was longer than any level place to get off the car.

His Lordship: What I should like you to find as nearly as you can is, whether the car-step, when the car was stopped, projected so far that it was dangerous, or whether it merely projected but the short distance which the defendants say it projected.

Juror: Well, we will retire.

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His Lordship: Then you have no answer in regard to the height of the step, whether that had anything to do with the matter or not. I direct your attention to that.

The jury retired again at 10.10 a.m.

Mr. Parmenter: Would your Lordship allow me to mention one feature in connection with the step, and that is: Should the jury not be directed, if the defendants stopped at an improper place, or rather they invited Mrs. Dowson to alight at an improper place, that would be negligence?

His Lordship: It is manifest if the car had been stopped with the step directly opposite there could be no negligence on the part of the defendants, unless the height of their step contributed to the injury.

Mr. Parmenter: The railway company claim that they have nothing to do with the platform. I submit, even if that is so, if there is a defective platform they had no right to stop opposite it.

His Lordship: Well, you have that finding for whatever it is worth already.

Mr. Parmenter: It is not a question of furnishing a platform; it is stopping at an improper place.

His Lordship: I understand that. I do not think I shall say anything to them about that.

The jury returned again at 11.45 a.m., with the previous answer to question 2 struck out, and the following answer substituted:—

“We find that the north end of the car-step was sufficiently shot past the north end of the platform to render it positively dangerous to passengers alighting. We also find that the height of the car-steps did not comply with the regulations of the Ontario Railway and Municipal Board, and that those circumstances caused the accident.”

His Lordship: Upon your findings I have directed that judgment be entered in favour of the plaintiff G. G. Dowson for \$2,500 and in favour of the plaintiff E. C. H. Dowson for \$401.55 with costs. Stay of 30 days.

The right of the trial Judge to ask the jury to explain their answer and the effect to be given to an answer by the foreman of the jury, or to an answer made by the jury, without retiring to consider their answer, are discussed in *Lowry v. Thompson* (1913),



29 O.L.R. 478, 15 D.L.R. 463; *Gray v. Wabash R.R. Co.*, 35 O.L.R. 510, 28 D.L.R. 244; and in *Townsend's Auto Livery v. Thornton*, 13 O.W.N. 237; with the result that, in my opinion, the learned trial Judge in the case at bar adopted and followed the course found in *Townsend's Auto Livery v. Thornton* to be the proper course.

For these reasons, I think the learned Judge properly accepted and acted upon the substituted answer to question 2, and that it is therefore on the substituted answer that this appeal must be disposed of.

It is admitted that the order of the Ontario Railway and Municipal Board, dated the 25th January, 1909, exhibit 7, referred to in the substituted answer of the jury, has, as against these defendants, the force of a statute. By that order it is directed as follows: "On closed double truck cars the height of the first step above the ground shall be not less than 14 inches nor more than 16 inches." The car in question in this action was a double truck car, and it is conceded that the step was 21 inches above the crossing or platform at which the car purported to stop, and it is further conceded that the step was 33 inches above the ground at the place where the car overshot the crossing or platform and where the female plaintiff alighted.

Mr. McCarthy argued that the statute under which the defendant company operated required it to stop when and where directed by the Corporation of the City of Toronto, and that this stopping place was one fixed by the city corporation under the Act; and that, there being no power given the defendants to erect on the highway a platform for their passengers to alight upon, it was not the defendants' duty, but the city's duty, to see that the proper facilities for passengers to alight were there provided. But the order does not so provide. By force of the statute and order, this duty and obligation is, to my mind, put upon the defendants, and the erection or equipment which it was necessary to provide thereunder was not a platform erected by the city, but a step on the defendants' car, meeting the requirements of the order of the Railway Board, i.e., a step not less than 14 inches nor more than 16 inches above the ground. The defendants did not furnish such a step, and it must have been apparent to the defendants that, without such a step or platform, the place

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where it is admitted the injured plaintiff was invited to alight was dangerous. The jury have found both the danger and the neglect to provide the step required by the statute, also that the danger and neglect were the proximate cause of the accident.

The question discussed on the argument as to whether or not the order of the Railway Board was unreasonable or impossible to comply with is not, in my opinion, open for consideration by us.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

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May 30.

ROWAN v. TORONTO R.W. Co.

*Interest—Action for Damages for Personal Injuries—Findings of Jury—“Verdict”—Judgment on Findings in Favour of Defendants—Affirmance by Court of Appeal—Reversal by Supreme Court of Canada—Judgment for Amount of Damages Found by Jury—Interest on Amount of Judgment from Date of first Judgment—Whether Recoverable—Judicature Act, secs. 35 (4), 60, 61.*

The jury's answers to questions submitted to them by the trial Judge are not a “verdict” within the meaning of sec. 35 (4) of the Judicature Act, R.S.O. 1914, ch. 56.

The effect of secs. 60 and 61 of the same Act, considered.

This action, which was in tort for damages for personal injuries, was tried with a jury, in June, 1897; questions were submitted to the jury, and on the answers the trial Judge directed judgment to be entered for the defendants. This judgment was affirmed on appeal to the Court of Appeal; but, on a further appeal to the Supreme Court of Canada, the judgments below were reversed, and it was directed (in October, 1899) that judgment should be entered in favour of the plaintiff for \$1,500, at which sum the jury had assessed the plaintiff's damages:—

*Held* (CLUTE, J., dissenting), that the plaintiff was not entitled to interest on the \$1,500 from June, 1897, to October, 1899.

Review of the legislation and authorities upon the subject of interest upon sums awarded by verdict or judgment.

*Per* CLUTE, J., that it was immaterial whether the findings of the jury might be said to amount to a verdict or not. The statute provides that interest is to run unless otherwise ordered by the Court from the time of the rendering of the verdict or giving of the judgment. The judgment was given in June, 1897, but by error was directed to be entered in favour of the defendants. The judgment of the Supreme Court of Canada had relation back to the date of the findings of the jury and the judgment directed by the trial Judge.

Order of MIDDLETON, J., affirmed.

MOTION by the plaintiff for an order or direction as to the settlement of the minutes of a judgment pronounced in 1899.

April 27, 1918. The motion was heard by MIDDLETON, J., in Chambers.

*J. E. Jones*, for the plaintiff.

*J. S. Duggan*, for the defendants.

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April 30. MIDDLETON, J.:—This action was tried on the 3rd June, 1897, and at the trial, as fully set out in the Supreme Court reports, *Rowan v. Toronto R.W. Co.* (1899), 29 S.C.R. 717, questions were submitted to the jury, and on the answers the trial Judge directed judgment to be entered for the defendants. This was affirmed upon appeal to the Court of Appeal; but in the Supreme Court of Canada that which had been regarded as a finding of contributory negligence in the Court below was not so treated; and, on the 3rd October, 1899, the appeal was allowed, and the judgments of the High Court and Court of Appeal were reversed, and it was directed "that judgment should be entered in favour of the appellant for \$1,500."

The judgment clerk, having this judgment presented to him to carry into effect, settled a judgment, dated the 20th January, 1900, directing that the plaintiff recover \$1,751.25.

This amount was arrived at by adding to the \$1,500 interest from the date of the trial until the date of the judgment.

The defendants then moved to vary the minutes by reducing the amount to \$1,500; this motion was heard by Sir William Meredith, then Chief Justice of the Common Pleas, in Chambers, on the 25th January, 1900, and his decision was reserved.

From what can be gathered from the papers and from his memory of what took place, I am satisfied that he thought the action of the judgment clerk was not warranted by the order of the Supreme Court of Canada, and he held his judgment in abeyance to allow an application to be made to the Supreme Court.

A motion was made to the Supreme Court for an order varying the judgment so as to make it direct payment of interest, or for an order declaring that the effect of the order as issued was to entitle the plaintiff to interest; but, on the 30th January, 1901, this motion was dismissed—the order reciting that the Supreme Court of Canada was *functus officio* and without jurisdiction.

Instead of the matter being again mentioned to the Chief Justice, it has remained in *statu quo* for more than 17 years, and is



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now renewed before me because the learned Chief Justice is now *functus officio*, not having delivered judgment within six weeks after his transfer to the Court of Appeal.

The delay for more than 17 years might well be treated as an abandonment of the claim.

But I entertain no doubt upon the question; and, in my view, the plaintiff has no right to the relief claimed.

The Supreme Court might well have so framed its order as to give interest from the date of the trial, for it had power to pronounce the judgment which in its view the trial Judge ought to have given, but it did not do so. The motion to vary the order asked variation upon the ground that the order did not give true expression to the real intention of the Court; and, as this was dismissed, it must be regarded as conclusively determined that the order as issued is what was meant.

The claim to interest is based upon certain clauses of the Judicature Act, which for convenience I refer to as they now stand, but which are in substance the same as the statute then in force.

Section 35 (4) of the Judicature Act (R.S.O. 1914, ch. 56) provides:—

“Unless otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceeding in the action including an appeal.”

It is said there was a verdict in 1897, and the effect of this section is to make it carry interest.

There are three answers to this.

First, there was no verdict or judgment until the judgment of the Supreme Court. It is admitted that before this there was no judgment, but it is said that there was a verdict: Section 60 provides that a jury may give a general or a special verdict. Section 61 provides that “the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him; and the jury shall answer such questions, and shall not give any verdict.” This makes it clear that under the statute the answers of the jury to questions of fact propounded by the Judge are not a verdict.

Secondly, the statutory provision gives interest only when the entry of judgment has been suspended by proceedings in the action in the nature of an appeal. There must have been an award in favour of the plaintiff, which has been kept in abeyance by some appeal or similar application by the defendant. In such case the delay is not to prejudice the plaintiff, but here the plaintiff's first recovery was in the Supreme Court.

Thirdly, the statute applies only when the Court has made no order to the contrary. When the Supreme Court made an order, in 1900, that judgment be then entered to the effect that the plaintiff do then recover \$1,500, it made an "order to the contrary."

The judgment clerk clearly added to the judgment of the Supreme Court the words "together with interest on the said sum from the date of the trial," and his action was, I think, contrary to the certificate of that Court.

*Borthwick v. Elderslie Steamship Co.*, [1905] 2 K.B. 516, is a decision to the same effect, but the statutory provisions upon which it is founded are not the same. Its importance here lies in the fact that when the action is dismissed in the first instance, but in appeal damages are given, it is for the appellate Court to give interest from the date of the trial, if in its opinion this should be done.

*McLaren v. Canada Central R.W. Co.* (1884), 10 P.R. 328, was a case in which there was a verdict, but the judgment was directed to be entered at a later date for the amount of the verdict. It was held that there was no right to interest between the verdict and judgment.

I should now direct that the minutes as settled be varied so as to reduce the recovery to \$1,500 as of the date of the minutes.

To shew my appreciation of the diligence displayed in bringing this matter to a close, I give no costs.

The plaintiff appealed from the order of MIDDLETON, J.

May 9. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

*Norman Sommerville and V. H. Hattin*, for the appellant. The learned Judge erred in saying that the Supreme Court of Canada, by their certificate or otherwise, made what he calls "an order to the contrary." The Supreme Court did not "otherwise order,"

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but issued a certificate to the Court below to enter judgment; and, when that was presented to the judgment clerk of the lower Court, he followed the usual practice and computed interest from the date of trial to the date of entering judgment. At no place throughout the reasons for judgment of the Supreme Court or in the formal order was there any direction that the verdict should not bear interest. The duty of the Supreme Court is only to find what the judgment ought to be, and it is left to the officers of the various Provincial Courts, in settling the judgments, to apply the Provincial statutes as to interest. "Otherwise ordered" must be a specific order, and not a mere presumption from the statements made by the Court. Secondly, the findings of the jury form a special verdict. The Supreme Court, and every one connected with all the Courts, treated such findings as a verdict. Section 112 of the Judicature Act, R.S.O. 1897, ch. 51 (sec. 61 of the present Act), says that where a Judge directs a jury to answer any questions of fact, they shall not bring in a verdict. But the questions here were questions not only of fact, but mixed questions of fact and law. The learned Judge here having asked the jury to find the damages, following the questions submitted, their answers constitute a verdict. Therefore, there being a verdict, interest should be allowed from the date of that verdict. Reference to *Sproule v. Wilson* (1893), 15 P.R. 349, at p. 352; Rule 264; sec. 35 (4) of the Judicature Act, R.S.O. 1914, ch. 56; Am. & Eng. Encyc. of Law, 2nd ed., vol. 29, pp. 1001, 1022, 1028 to 1043. The cases referred to by MIDDLETON, J., are distinguishable. The *Borthwick* case is under the English statute, by which interest is not given on a verdict, but only on a judgment. Nor was there a jury in that case. At the time of the *McLaren* case, owing to the state of the practice, it was necessary, in order to create a stay, to direct that judgment be not entered until the beginning of the next term, and in that case the Judge specifically "otherwise ordered." Counsel also relied upon *Gordon v. City of Victoria* (1900), 7 B.C.R. 339.

J. W. Bain, K.C., for the defendants, respondents, was not called upon.

From his brief the following outline of his proposed argument is taken:—

Section 35 (4) of the present Judicature Act (sec. 116 of R.S.O. 1897, ch. 51) plainly presupposes an award in favour of the party



who is claiming interest on it; that interest is given in order that the delay in actual recovery may not prejudice the party. But here the plaintiff's first recovery was in the Supreme Court of Canada. Section 35 (4) applies only where it is not otherwise ordered by the Court. The appellate Court has power to make such an order to the contrary; and the Supreme Court of Canada did make such an order when, in 1900, it ordered that the plaintiff should recover \$1,500 and made no provision as to interest. The Supreme Court of Ontario has no power to overrule the Supreme Court of Canada; and, by adding interest in the settled minutes of judgment, the judgment clerk acted contrary to the certificate of the Supreme Court of Canada. There is no verdict from which to date the interest. In sec. 61 of the present Judicature Act (sec. 112 of R.S.O. 1897, ch. 51) a plain distinction is made between answering questions and giving a verdict. In this case, the jury did not give a verdict. A verdict in an action is not complete until the trial Judge has ordered it to be entered as the verdict of the jury; if it were otherwise, the jury could deliver their verdict to the clerk of the Court. The Court alone can direct the enforcement of the findings of the jury; the findings are not complete as a verdict until the Judge has ordered them to be entered; and that was not done in this case. Reference to *Borthwick v. Elderslie Steamship Co.*, [1905] 2 K.B. 516; *McLaren v. Canada Central R.W. Co.*, 10 P.R. 328; *Hope v. Beatty* (1876), 7 P.R. 39; *Woodruff v. Canada Guarantee Co.* (1881), 8 P.R. 532.

May 30. MULLOCK, C.J.Ex.:—Appeal from an order of Middleton, J. This was an action to recover damages for personal injuries, and was tried by a jury on the 3rd June, 1897. Questions were submitted to the jury and answers given, one of them fixing the damages at \$1,500. The jury did not purport to render a verdict either general or special. The trial Judge directed judgment to be entered for the defendants, and the Court of Appeal affirmed the judgment, but the Supreme Court of Canada, by order dated the 3rd October, 1899, directed that the judgment of the trial Judge and of the Court of Appeal be reversed "and that judgment should be entered in favour of the appellant for \$1,500." When the certificate of this order was presented to the judgment clerk of the High Court of Justice, on the 20th January, 1900, he

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settled the order intended to give effect to the judgment of the Supreme Court by directing the defendants to pay to the plaintiff \$1,751.25, the additional \$251.25 being for interest on the \$1,500 damages awarded by the jury, computed from the date of the trial. The defendants then moved before Sir William Meredith, then Chief Justice of the Common Pleas, to reduce the amount to \$1,500, but he reserved judgment in order to enable the plaintiff to apply to the Supreme Court of Canada to amend its order by adding interest to the \$1,500.

The Supreme Court, however, refused the application, on the ground that it was *functus officio*. Later, an application was made to Mr. Justice Middleton to vary the order of the judgment clerk by reducing the amount to \$1,500, and this he ordered. The appeal is from such order.

I am of the opinion that the order of Mr. Justice Middleton was right. The Judicature Act, R.S.O. 1914, ch. 56, sec. 35, sub-sec. (4), declares that, "unless otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceeding in the action including an appeal." For a plaintiff to be entitled to recover interest after trial, under the provisions of this section, upon the damages awarded by the jury, it must appear either that a verdict has been rendered or judgment given in favour of the plaintiff. The plaintiff's counsel contended before us that the answers of the jury constituted a verdict. I am not able to accede to that view. Section 61 of the Judicature Act indicates that answers to questions and a verdict are not the same. That section reads as follows: "Upon a trial by jury, except in an action for libel, the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him; and the jury shall answer such questions, and shall not give any verdict." Thus, where questions are submitted to the jury to be answered, there never can be a verdict. That having happened here, there was no verdict, nor was there any judgment in the plaintiff's favour until that of the Supreme Court, and the date of the order of the Supreme Court was the earliest moment from which the plaintiff was entitled to interest.

For this reason I think the appeal fails.

It was also argued before us that the order of the Supreme Court was the order which the trial Judge should have made on the 3rd June, 1897, and that therefore the plaintiff was entitled to amend the judgment entered below as of its date by directing payment to the plaintiff of the \$1,500 mentioned in the order of the Supreme Court. This argument is based upon the theory that the order of an appellate Court is the order which the Court below must necessarily have made. Such is not, however, the law. The power of an appellate Court is not limited to correcting errors below. For example, where, pending an appeal, the law has been varied, the appellate Court may apply the new law, thus making an order which the Court below would not have been entitled to make: *Quilter v. Mapleson* (1882), 9 Q.B.D. 672; *Borthwick v. Elderslie Steamship Co.*, [1905] 2 K.B. 516. It is the duty of the Court of Appeal to make such order, whether corrective or otherwise, as the case may require, and its order when made, unless otherwise provided, must be interpreted as determining the rights of the parties as of the date of the order. Here the Supreme Court, by its order of the 3rd October, 1899, determined that on that day, not on an earlier day, the plaintiff was entitled to judgment for \$1,500.

The Supreme Court, if it had seen fit, might have awarded interest to the plaintiff. It did not do so; and the proper inference is, not that the Supreme Court omitted to make the order which the case called for, but that it did not consider the plaintiff under all the circumstances entitled to interest. Until the 3rd October, 1899, the plaintiff was not entitled to damages. On that day for the first time he became entitled to payment. The defendants' indebtedness to the plaintiff, as on that date and no other date, is *res judicata*, and it is not competent for the Court below to increase the amount found due to the plaintiff by the Supreme Court, by saying that the amount declared by the Supreme Court to be due on the 3rd October, 1899, became due on any earlier date.

For this reason also, the appeal fails, and should be dismissed with costs.

RIDDELL, J.:—The facts of this case are fully and accurately set out in the reasons for judgment of Mr. Justice Middleton. The sole point for determination is, whether the jury's answers to

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questions submitted to them by the trial Judge are "a verdict" rendered, within the meaning of sec. 35 (4) of the present Judicature Act.

We were much pressed by counsel on the effect of the history of the legislation on the subject of interest; but I am unable to derive much, if any, assistance from it.

The history of interest in the Courts in our Province may be considered as beginning with (1837) 7 Wm. IV. ch. 3.

Before going over the legislation, it may be well to examine the state of the existing law in respect to interest. There are two questions quite distinct from each other which were mixed together on the argument of this appeal, but which should be kept quite distinct: (1) the right of the jury to allow interest; and (2) the right to interest upon judgment.

The abhorrence of interest exhibited by the common law is well known. The Englishman whose customs became the common law had his full share of universal human nature which causes men to hate to pay more than they must. Of course Holy Writ was appealed to, and philosophy with its jargon of "barren metal," etc. Whatever the cause, there is an instinctive objection in the borrower to repay more than he borrowed. We have a long list of statutes concerning interest or usury, the object of which was the protection of the borrower, who was to be allowed to make all the money he could by the use of the loan, while the lender must be content with a certain fixed sum or none.

In theory a jury could and should allow interest where it was agreed to be paid if the contract were otherwise unexceptionable; but in no other case could interest be allowed. Such interest was part of the debt sued for; any interest allowed where not stipulated for must be in the nature of damages. Juries had been known, before being permitted to award interest in certain cases by legislation, to use substantial justice by increasing the damages; but that was what Blackstone calls "a kind of pious perjury," and was certainly against the law.

In England the statute of (1833) 3 & 4 Wm. IV. ch. 42, sec. 28 (Imp.), enacted that the jury might, "if they shall think fit," allow interest not exceeding the current rate upon "all debts or sums certain" from the time at which they were payable if payable by virtue of a written instrument at a certain time, or, if not,

from the time of demand in writing giving notice that interest would be claimed.

Section 29 allowed the jury to "give damages in the nature of interest, over and above the value of the goods," in cases of trover and trespass *de bonis asportatis*, and above the money recoverable on an assurance policy.

Our statute (1837) 7 Wm. IV. ch. 3 (U.C.) followed the English Act closely—sec. 20 corresponding to sec. 28 of the English Act and sec. 21 to sec. 29. It will be seen that, under this legislation, the jury, while they must give interest when it was lawfully stipulated for, were given a discretion to give "damages in the nature of interest" in certain cases of contract and a very few cases of tort: see *Morley v. Lake Shore and Michigan Southern R.W. Co.* (1892), 146 U.S. 162, at p. 168.

These provisions came forward in 1859 in the C.S.U.C. as ch. 43 (an Act respecting interest), and are found in the Common Law Procedure Act, R.S.O. 1877, ch. 50, as secs. 266, 267, 268—in the revision of 1887 in the Judicature Act, R.S.O. 1887, ch. 44, as secs. 85, 86, 87—and were all repealed by the Judicature Act, 1895, 58 Vict. ch. 12, sec. 192 (and schedule), but re-enacted as secs. 118, 119, 120 of that Act; then R.S.O. 1897, ch. 51, secs. 113, 114, 115; 3 & 4 Geo. V. ch. 19 and R.S.O. 1914, ch. 56, secs. 34, 35 (1), (2), (3)—and so we leave it.

This branch of the legislation has little to do with the present case, but the other branch is in a different position.

(2) At the common law, judgments did not bear interest at all, though sometimes by a side-wind the judgment creditor could be allowed interest on his judgment if the matter came into equity, e.g., *Godfrey v. Watson* (1747), 3 Atk. 517, 518; *Lee v. Lingard* (1801), 1 East 401, 403; it was, however, admitted, even in equity, that the judgment was the *debitum recuperatum*, the stated damages between the parties.

But, comparatively early, there were statutory provisions to prevent injustice to the plaintiff from the defendant bringing a writ of error. The statutes 3 Hen. VII. ch. 10 and 19 Hen. VII. ch. 20 provided that on an unsuccessful proceeding in error to reverse a judgment for the plaintiff, the successful party should "recover his costs and damages, for his delay and wrongful vexation in the same, by discretion of the justice" (*sic*, but it should be "justices,"

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as there was no Court of Error with only one judge) "before whom the writ of error is sued."

There was considerable fluctuation in opinion as to when such damages should be allowed, but it was at length settled that they would be allowed only when damages could be allowed in the action itself. The cases will be found in Tidd's Practice, 8th ed. vol. 2, pp. 1240 *sqq.* Never but once were such damages allowed in a case of tort: *Lonsdale v. Littledale* (1793), 2 H. Bl. 267; and that case was disapproved: *Becher v. Jones* (1810), 2 Camp. 428 (note), and cases cited 2 Tidd, p. 1241.

It was the practice to allow damages, where allowed at all, at the usual rate of interest, literally interest in the nature of damages.

The statute of (1837) 7 Wm. IV. ch. 3 (U.C.), by sec. 22, made a similar provision (the reason is quite explainable by the practice of "Appeal" and "Error," now of no importance and of none but antiquarian interest). Section 22 reads:—

"If any person shall sue out any Writ of Error or Appeal, upon any judgment whatsoever, given in any Court in any action personal, and the Court of Error or Appeal shall give judgment for the defendant in error, then interest shall be allowed by the Court of Error or Appeal, for such time as execution has been delayed by such Writ of Error or Appeal, for the delaying thereof."

This was carried into the (1859) C.S.U.C. as ch. 13, sec. 50:—

"When on an appeal against a Judgment in any action personal, the Court of Error and Appeal gives Judgment for the Defendant in error, interest shall be allowed by the Court for such time as execution has been delayed by the appeal."

Repealed by (1877) 40 Vict. ch. 7, sched. B., it reappears in substance as sec. 43 of the Court of Appeal Act, R.S.O. 1877, ch. 38: "When, on an appeal against a judgment in any action personal, the Court of Appeal gives judgment for the respondent, interest shall be allowed by the Court for such time as execution has been delayed by the appeal."

Before the next revision, that of 1887, important legislation had been passed, which it was thought could be moulded to cover the case, and the former language was no longer used: R.S.O. 1887, ch. 44, sec. 83, being quite different.

The old rule that judgments should not bear interest was



changed in England by 1 & 2 Vict. ch. 110, sec. 17, which enacted that every judgment debt should carry interest at the rate of 4 per cent. "from the time of entering up the judgment." Our legislation goes back to the Common Law Procedure Amendment Act of 1866, 29 & 30 Vict. ch. 42 (Can.), which, by sec. 2, for the first time mentions the "verdict:" "2. In any suit or action in which any verdict is rendered for any debt or sum certain, on any account, debt, or promises, such verdict shall bear interest at the rate of 6 per cent. per annum from the time of the rendering of such verdict, if judgment is afterwards entered in favour of the party or person who obtained such verdict, notwithstanding the entry of judgment upon such verdict has been suspended by the operation of any rule or order of Court which may be made in such suit or action, and in all cases damages shall be assessed only up to the day of the verdict."

Thoroughly to understand this, the state of the practice before the Judicature Act must be borne in mind. The pleadings being completed in a common law Court, a record was made up and taken to an entirely different Court, the Court of the Commissioners of Assize and Nisi Prius (at this time really of Nisi Prius), the "Assize Court." In that Court the case was tried, and the jury gave a "verdict." He for whom the verdict was given had the "postea;" he brought the record to the office of the common law Court in which the proceedings were, and there the officer of that Court entered up judgment (without an order of the trial Judge or of any one else) unless the entry of the judgment was stayed by rule or order. The object then of this section was two-fold: (1) to give interest on the amount of the verdict in certain personal actions in contract (not by any means in all such actions, as the plaintiff found to his sorrow in *Woodruff v. Canada Guarantee Co.*, 8 P.R. 532); and (2) to provide that such interest should be payable from the "time of the rendering of such verdict," not from the time of the entering of judgment thereon.

This came forward unchanged as R.S.O. 1877, ch. 50, sec. 269, when the Common Law Procedure Act became R.S.O. 1877, ch. 50. Then came the Judicature Act of 1881, which abolished the Courts of Nisi Prius etc. Commissions of Assize and Nisi Prius had ceased to be issued in fact by the provisions of the statute (1855) 18 Vict. ch. 92, sec. 43 (Can.), but the Judges of Assize had the

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same powers and functions as though the Commissions had actually issued to them. (See an article, "New Trial in Present Practice," 27 Yale Law Journal 353, at p. 357, January, 1918.) The Judicature Act, 1881, provided, by Rules 273, 274, 275, for a new method of entering judgment, viz., by direction of the trial Judge. From this time on, no judgment could be entered on a verdict; the registrar etc. must follow the directions of the Judge.

The next statute is the Administration of Justice Act, 1884, 47 Vict. ch. 10, which, by sec. 4, allowed interest on a verdict or judgment in an action for tort in cases in which the jury were permitted by secs. 266, 267, and 268 of the Common Law Procedure Act to allow interest up to the rendering of the verdict. This is the first provision for the allowance of interest on a verdict or judgment in cases of tort. The provision is that "the verdict or judgment, as the case may be, shall bear interest from the time of the rendering of the verdict, or of giving the judgment, notwithstanding that the entry of judgment upon the verdict, or upon the giving of the judgment, shall have been suspended by the operation of any rule or order of Court made or of proceedings had in any such suit or action, whether in the Court in which the action is pending or in appeal." It cannot be said that the language of this section is happily chosen, but the meaning is clear enough: (1) Interest is now to be allowed upon verdicts in certain cases of torts, whereas formerly it could be allowed only in cases of contract; (2) and the interest is not to be prevented from running from the date of verdict by reason of adverse delay in entering judgment. It would seem that "judgment" is used in two senses in this section. It is recognised that a case may be tried by a jury or by a Judge; if by the former the decision is a "verdict" rendered, if by the latter the decision is a "judgment" given—in either case there is to be a "judgment entered," in the former case "upon the verdict," in the latter "upon the giving of the judgment." Rule 351 of the original Judicature Act thus became widened in its application. In the revision in 1887, the two provisions for interest after trial were consolidated and extended in R.S.O. 1887, ch. 44, sec. 88: "Unless it is otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment upon the verdict, or upon the giving of the

judgment, shall have been suspended by any proceedings in the action, whether in the Court in which the action is pending or in appeal"—which is the present R.S.O. 1914, ch. 56, sec. 35 (4), with trifling verbal differences. It will be observed that we still have the word "judgment" used in two senses. No legislation previous to the revision of 1887 can assist the plaintiff here. His action is for trespass to the person, a tort not covered by the Act of 1884.

But of course we may examine the meaning of the word in the original legislation by which interest might be allowed on a "verdict:" (1866) 29 & 30 Vict. ch. 42, sec. 2. There were then two kinds of verdict, the general and the special verdict. In the general verdict the jury found for one party or the other and if for the plaintiff (in personal actions) the amount of damages; in the special verdict the jury found the facts and left the further determination to the Court. In either case if and when the plaintiff entered up his judgment he had interest from the day of the rendering of the verdict—this interest being a creature of the statute: *Sproule v. Wilson*, 15 P.R. 349; and compare *Malcolm v. Leys* (1892), *ib.* 75.

The power of the jury to give a general verdict was modified in 1873 by the Act 36 Vict. ch. 8, sec. 20 (O.), which enacted that "where the Court or a presiding Judge shall otherwise direct, it shall not be lawful for such jury to give a general verdict, and it shall be the duty of such jury to give a special verdict if the Court or presiding Judge shall so direct." The following year, 1874, the right of the jury to give a verdict at all was taken away in certain cases: the trial Judge, "instead of directing the jury to give either a general or a special verdict may direct the jury to answer any questions of fact . . .; and in such case the jury shall answer such questions, and shall not give any verdict; and on the finding of the jury upon the questions which they answer, the Judge shall enter the verdict; and the verdict so entered, unless moved, against, shall stand and be effectual as if the same has been the verdict of the jury:" 37 Vict. ch. 7, sec. 32.

The power of giving any verdict might thus be taken away from the jury: *Furlong v. Carroll* (1882), 7 A.R. 145; and, when this was done, the verdict was the work of the Judge. I cannot understand how the Legislature could have indicated more clearly

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(except by the very words) that the answering by a jury of questions was not a verdict.

The subsequent legislation does not assist the plaintiff. The first revision, R.S.O. 1877, ch. 50, sec. 264, is *totidem verbis*, and the second, R.S.O. 1887, ch. 44, sec. 84, provides that on the answers "the Judge shall direct judgment to be entered"—apparently recognising that where all a jury does is to answer questions there is, properly speaking, no verdict at all. The Act of 1895, 58 Vict. ch. 12, sec. 117, and R.S.O. 1897, ch. 51, sec. 112 (in addition to purely verbal changes), makes a change in the provision that "the Judge shall direct judgment to be entered," and provides, "on the finding of the jury upon the questions which they answer, the Judge may direct judgment to be entered." This Act was in force when this action was tried (June, 1897); our present Act is no more favourable to the plaintiff: R.S.O. 1914, ch. 56, sec. 61.

I can find nothing in the statutes or cases entitling us to call that a verdict which the jury lawfully did in pursuance of a statute which says they are not to give a verdict, and upon which there is not a verdict to be entered or given or rendered, but a direction to enter a judgment.

We are pressed with the judgment of the Supreme Court of British Columbia in *Gordon v. City of Victoria*, 7 B.C.R. 339 (see S.C. (1897), 5 B.C.R. 553), in which they apparently decided that answers to questions by a jury, which were ultimately held to entitle the plaintiff to a judgment, constitute a "verdict" upon which interest is to be allowed under the Dominion Interest Act, now R.S.C. 1906, ch. 120, sec. 14. (See 57 & 58 Vict. ch. 22, sec. 3 (D.)) I do not presume to criticise this judgment—I have enough trouble to keep track of the practice of this Province—but I would say that the decision that certain words in a Dominion statute mean a certain something when applied to British Columbia practice does not help much toward the determination that the same words mean the same thing in an Ontario statute applied to Ontario practice. It is possible the difference between the British Columbia case and this will be found to depend upon the prohibition of the jury giving any verdict at all in our practice, but I do not pursue the inquiry.

I have read all the cases cited and others, but I can find none of much assistance. *Hope v. Beatty*, 7 P.R. 39, *Woodruff v. Canada*.

*Guarantee Co.*, 8 P.R. 532, and *McLaren v. Canada Central R.W. Co.*, 10 P.R. 328, are on cognate points, but not applicable.

Then it was argued that to withhold the name "verdict" from such answers would be to emasculate the section, now sec. 35 (4). But that is not the case. At present the Judge may, in such an action as this, (1) try the case himself; he "gives the judgment," and there is an "entry of judgment," and interest on "the judgment" is allowed; (2) allow the jury to "give a general verdict" (sec. 60 (1)); they render the verdict, and interest is allowed on the amount of "the verdict;" (3) direct the jury to "give a special verdict" (sec. 60 (1)); they render such a verdict, including of course the sum to which the party is entitled, and interest is allowed on the amount so found; or (4) refuse to allow them to give a verdict at all. It is only in the last case that sec. 35 (4) does not apply. Nor does Rule 264\* make any difficulty. Every day at the Assizes we enter on the record the verdict of a jury with (generally) a direction to enter up judgment. Where there is no jury, we generally direct judgment to be entered. The Rule does not mean that in every case there must be a verdict and a judgment. In most cases there is no verdict, but the verdict is entered if there is one.

This appeal was argued at such length and with such earnestness that I have thought it well to examine the statutes at length, historically and otherwise; and I can see no reason for allowing the appeal.

If the matter were in our discretion (as I think it is not), I should not allow the interest after this long delay: *Redfield v. Ystalyfera Iron Co.* (1884), 110 U.S. 174; *United States v. Sanborn* (1890), 135 U.S. 271.

The appeal should be dismissed with costs.

SUTHERLAND, J.:—In the judgment appealed from, Middleton, J., has fully dealt with the questions raised on this appeal. I agree with his disposition thereof, and can add nothing useful to what he has said. I would dismiss the appeal with costs.

KELLY, J., concurred.

\*264. The verdict and judgment shall be endorsed on the record, and shall also be recorded by the Registrar or officer acting as clerk at the sittings in a book to be kept for recording the proceedings thereat.

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CLUTE, J.:—The Supreme Court of Canada, on the 3rd October, 1899, reversed the judgment of the Court of Appeal and directed that the said appeal should be and the same was allowed, and that the said judgments of the Court of Appeal and of the Hon. Mr. Justice MacMahon should be and the same were reversed and set aside, and that judgment should be entered in favour of the appellant for the sum of \$1,500.

The effect and meaning of this judgment obviously is that the judgment of the trial Judge was wrong and should have been entered for \$1,500. The statute then operating, that amount should, in my opinion, bear interest from the date the trial Judge directed judgment, the 3rd June, 1897. Form 160, then in force, directs that the date of the judgment shall be "the date of pronouncing judgment." The statute refers to the verdict or judgment given at the trial, and not to intermediate proceedings or judgments in appeal by which the wrong entry of the trial judgment may be corrected. It was the duty, therefore, of the judgment clerk, upon the receipt by him of the judgment of the Supreme Court of Canada, to give effect to the reversal of the judgment wrongly entered at the trial; and this is what he did, and settled the judgment, dated the 20th January, 1900, for \$1,751.25, thus allowing interest on \$1,500 from the 3rd June, 1897, the date of trial, to judgment.

The Supreme Court of Canada refused the motion to vary this judgment so as to allow interest, on the ground of want of jurisdiction.

The delay in the final disposition of the motion is not raised as an objection, owing to the responsibility of counsel therefor by mutual indulgence, as it was said.

Section 112 of the Judicature Act, R.S.O. 1897, ch. 51, now sec. 61 of R.S.O. 1914, ch. 56, provides that upon a trial by jury (except in certain cases) "the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose; and in such case the jury shall answer such questions, and shall not give any verdict; and, on the finding of the jury upon the questions which they answer, the Judge may direct judgment to be entered." That is what occurred in this case. The trial Judge and the Court of Appeal considered that the



answer to one question amounted to a finding of contributory negligence. The Supreme Court of Canada in effect found that it meant that there was no contributory negligence. The result was that the judgment which the trial Judge on the 3rd June, 1897, directed to be entered for the defendants, should have been entered for the plaintiff, in which case the plaintiff would have been entitled to interest from that date.

Section 116 of the Judicature Act, R.S.O. 1897, ch. 51, now sec. 35 (4) of R.S.O. 1914, ch. 56, is as follows: "Unless it is otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceedings in the action, whether in the Court in which the action is pending or in appeal."

It was urged upon the argument, for the plaintiff, that the finding of the jury was in effect a verdict, and for the defendants, that the jury by express enactment answered questions and did not and could not give any verdict under the wording of sec. 112. I think it wholly immaterial whether the findings of the jury may be said to amount to a verdict or not. The statute provides that interest is to run unless otherwise ordered by the Court from the time of the rendering of the verdict or of the giving of the judgment. In this case, the judgment was given on the 3rd June, 1897, but by error it was directed to be entered in favour of the defendants instead of the plaintiff.

The Court in such case will consider that as done which ought to have been done; and, when the Supreme Court of Canada reversed the judgment for the defendants and directed judgment in favour of the plaintiff, it had relation back to the date of the findings of the jury and the judgment directed by the trial Judge, for it was upon the findings of the jury that the judgment was entered.

There was no appeal in respect of interest. The appeal was in respect of the right of the plaintiff to have judgment entered for him upon the findings of the jury at the trial. The statute expressly directs interest from the time of the giving of the judgment. The right to interest is by virtue of the statute, and not by virtue of any decision of the Supreme Court in respect to interest. The

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error having been cured, the statute refers to the judgment that should have been entered for the plaintiff on the 3rd June, 1897. It is significant, as I am informed by the judgment clerk, that this has been the universal practice heretofore.

In *Gordon v. City of Victoria*, 7 B.C.R. 339, the plaintiff obtained a verdict at the trial, but the trial Judge dismissed the action. The Full Court allowed the plaintiff's appeal and ordered that judgment be entered in the plaintiff's favour for the amount of the verdict. Held, that the plaintiff was entitled to interest from the date of the verdict. In giving judgment McColl, C.J., said: "The Full Court could only properly have ordered judgment to be entered upon the verdict of the jury if of opinion that the plaintiff was entitled to judgment upon the findings of the jury and the facts not in dispute. That being so, the learned trial Judge ought to have given effect to the verdict at once instead of leaving the parties to move for judgment, and giving it for the defendants."

In that case, as in this, the Judge was in error in entering judgment for the defendants. It was by virtue of the decision of the full Court that judgment was finally directed, and the Court held that the plaintiff was entitled to interest.

I am unable to agree with my brother Middleton that in this case "it is otherwise ordered by the Court." I do not think that the Supreme Court of Canada gave any judgment on the question of interest. In effect the judgment for the defendants was reversed, and judgment directed to be entered for the plaintiff for \$1,500. This is the amount assessed by the jury, and should bear interest from the time when judgment for that amount ought to have been entered.

The English cases of *Borthwick v. Elderslie Steamship Co.*, [1905] 2 K.B. 516, and *Ashover Fluor Spar Mines Limited v. Jackson*, [1911] 2 Ch. 355, do not assist very much in a decision of this case. They are decided under a different statute, and different rules.

In the *Borthwick* case, at the trial of the action, judgment was entered for the defendants. An appeal was allowed, and the judgment of the trial Judge set aside, and judgment directed to be entered for the plaintiff "for such sum as might be assessed by a referee to be agreed upon by the parties. . . . Liberty to apply."

Upon a further appeal to the House of Lords, the judgment of the Court of Appeal was affirmed. The assessment of damages stood over by consent pending the appeal to the House of Lords, but subsequently the amount for which the judgment should be entered for the plaintiff was agreed between the parties, and it was further ordered that interest should be paid, but no time was specified with regard to this matter. The agreed amount of damages was paid to the plaintiff, but a dispute arose as to the date from which interest ought to run,\*the defendants being willing to pay interest from the time when the amount of damages was determined until payment thereof, and the plaintiff claiming interest from the date of the judgment given by the learned Judge at the trial. The application was made in pursuance of the liberty to apply. The result of the application was, that judgment should be entered for the agreed damages with interest upon the amount from the date of the judgment of the appellate Court. It will be observed that, at the date of the judgment, the amount had not been ascertained. The Court declared that it was not desirable to say what the result of the application would have been, had the amount claimed at the trial been a fixed sum, and had the only question for decision been whether it was due or not. In other words, the Court refrained from pronouncing an opinion upon the exact point involved in this case.

Collins, M.R., refers to Order XLI., r. 3, which directs that, where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or Judge shall otherwise order, and the judgment shall take effect from that date: provided that by special leave of the Court or a Judge a judgment may be antedated or postdated. See also Order LVIII., r. 1.

Collins, M.R., after reference to a certain railway case, says: "The principle to be gathered from the decision is that till the sum was ascertained there was no exigency on the railway company to pay anything, and consequently no sum on which they could be called on to pay interest." In the present case the sum was ascertained at the trial.

Romer, L.J., said that, when the plaintiff has failed in the Court below so that his action has been dismissed, if he succeeds

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on appeal it cannot be properly said that the judgment of the Court of Appeal must be regarded for all purposes as if it had been the judgment given by the Judge in the Court below. The judgment in favour of the plaintiff must be treated as of the date on which it was given in the Court of Appeal, subject to the right of that Court to antedate its judgment.

In the *Ashover* case, Eve, J., in referring to the *Borthwick* case, pointed out (p. 359) that it was conceded by counsel on behalf of the defendants and affirmed in terms by Romer, L.J., that the amount ultimately ascertained was to be treated as if it had been mentioned in the order, with the result that interest thereon ran from the date of the judgment. The order was in fact a judgment for the sum subsequently ascertained, and on the sum being ascertained and a note of the amount being endorsed upon the judgment, execution would issue.

The Act under which interest was allowed in the *Borthwick* case is the Judgments Act (1838), 1 & 2 Vict. ch. 110, sec. 17, which provides that every judgment debt shall carry interest at the rate of 4 per centum per annum from the time of entering up the judgment, and such interest may be levied under writ of execution on such judgment. This is quite different from our Judicature Act, R.S.O. 1897, ch. 51, sec. 116, which clearly has reference to the trial, and provides that a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment.

The difference in the wording of the English and Ontario Acts, and the fact that the Court in the *Borthwick* case was careful to avoid stating what would have been the result of the application had the amount claimed at the trial been a fixed sum, confirms me in the view that in the present case interest should be allowed from the date when judgment should have been entered for the plaintiff.

In my opinion, with deference, the order of Mr. Justice Middleton should be set aside, and the minutes as settled by the judgment clerk confirmed, with the costs of this motion here and below.

*Appeal dismissed; CLUTE, J., dissenting.*

[MEREDITH, C.J.C.P.]

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June 1.

RE KENDREW.

*Will—Construction—Devise and Bequest of Real and Personal Property—“Heirs and Assigns”—Estate in Fee Simple in Land—Absolute Interest in Personalty—Application for Order Declaring Construction of Will—Costs.*

Where an estate is devised to the heirs of a person to whom a prior estate of freehold has been given, the heirs take by descent and not by purchase, and an estate in fee simple is created in the ancestor.

*Van Grutten v. Foxwell*, [1897] A.C. 658, followed.

The testator devised and bequeathed “two stores” and half of his other property to his granddaughter “to be held by her during her life and at her death to her heirs and assigns forever.”—

*Held*, that the granddaughter took an estate in fee simple in the land devised. And *held*, that the chattel property bequeathed to the granddaughter became hers absolutely by the terms of the bequest: the testator meant that the land and goods should go in the same manner; and, as the land, by force of the rule of law, became the granddaughter’s absolutely, so did the goods.

*Comfort v. Brown* (1878), 10 Ch. D. 113, and *De Beauvoir v. De Beauvoir* (1852), 3 H.L.C. 524, applied.

In the peculiar circumstances of the case, no order was made as to the costs of a summary application for the determination by the Court of the questions arising as to the construction of the will.

MOTION by Arthur Tipling, who had been appointed, by an order of the Court, trustee to complete the execution of the trusts of the will of William Kendrew, deceased, upon the death of the remaining executor, for an order determining a question arising upon the terms of the will, and directing payment out to the applicant of the moneys in Court.

The testator died on the 14th August, 1891.

The will was dated the 16th September, 1890, and was as follows:—

“I appoint my friends George Wright builder and Ambrose Kent jeweller both of the city of Toronto and my daughter Ann Tipling hereinafter called trustees to be trustees and executors of this my last will and testament.

“I give devise and bequeath all my real and personal estate unto my trustees upon trust.

“1. To pay all my just debts and funeral expenses.

“2. To pay the sum of four hundred dollars to my niece Mary Jane Stevenson.

“3. Out of the rents and income coming into their hands to keep the buildings on the lands hereby devised during the con-

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tinuance of the trust in good repair and insured in good reliable companies.

"4. To hold all the rest and residue of my property both real and personal wheresoever and howsoever situate in trust to allow and permit my daughter Ann Tipling to receive the rents pr fits yearly income and interest arising therefrom during her natural life free from the control of her present or any future husband.

"5. If my said daughter should desire to alter the houses on Yonge street numbered 510 and 512 and to change them into brick buildings suitable for stores and in all respects similar to the two brick stores I now own adjoining them being 514 and 516 on the west side of Yonge street and should the moneys arising from the yearly income of my said estate not be sufficient for that purpose I direct them to take from the principal moneys now lying in the Canada Permanent Loan and Savings Company or from moneys lent on mortgage sufficient for that purpose.

"6. After the death of my said daughter Ann Tipling all the rest and remainder of my property except the property owned by me on the west side of Yonge street shall be divided into two equal parts and one half thereof and the two houses numbered 510 and 512 shall be held by my trustees in trust from the yearly income thereof to pay for the maintenance and education of my grandson Arthur Tipling until he shall attain the age of twenty-one years when the whole of the same and all accumulation thereof shall go to him and his heirs.

"7. The two stores 514 and 516 and the other half of my property after the death of my said daughter I give devise and bequeath to my granddaughter Louisa Tipling to be held by her during her life and at her death to her heirs and assigns forever.

"8. I direct that my daughter the said Ann Tipling and her husband shall keep a competent female servant to assist in their housework and if my said daughter or her husband shall not obey this my direction I direct my said trustees to retain from the income hereinbefore directed to be paid to my daughter the sum of twenty dollars per month for such time or times as they shall not keep such servant which shall be added to the principal sum to be in the hands of my trustees and go to her children as hereinbefore provided.

"9. It is my desire that in any work done on my buildings



and in the letting of the houses and collecting the rents as above mentioned my trustees may if they feel they can properly do so employ my son-in-law Mark Tipling."

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Ann Tipling died on the 9th December, 1916, intestate, leaving no estate except what was derived from the will of her father, William Kendrew, as above, and no legal representative of her estate had been appointed.

Ambrose Kent and George Wright had previously been allowed to retire from their positions of trustees and executors under the will.

At the time of her death, Ann Tipling had on deposit with the company named in the will (the Canada Permanent Mortgage Corporation) a sum of \$5,830, said to be derived from the trust estate of the testator.

After Ambrose Kent and George Wright were discharged from the trusts of the will, Mark Tipling, the husband of Ann Tipling, acted as trustee in fact in the place of his wife, and was said to have moneys of the estate in his hands.

The order appointing Arthur Tipling trustee was made on the 30th May, 1917. By the same order, Mark Tipling was directed to account to Arthur Tipling for all moneys received and disbursed in respect of the estate of William Kendrew; and the moneys on deposit with the Canada Permanent Mortgage Corporation to the credit of Ann Tipling were ordered to be paid into Court, and were so paid in.

The question propounded for determination was as follows:—

Whether, under the will of William Kendrew, deceased, his granddaughter Louisa Tipling took a life-estate in the stores in Yonge street mentioned in the will and in one half of the other property of the deceased, or whether the said property descended to her absolutely.

May 15: The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, Toronto.

*T. R. Ferguson*, for the applicant.

*A. R. Clute*, for Louisa Tipling.

*T. N. Phelan*, for Mark Tipling.

June 1. MEREDITH, C.J.C.P.:—Under cover of an application to the Court for assistance in the performance of his duty as

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executor of the will in question, the applicant has made a long and strong attack upon the claims of the respondent under that will. The applicant and respondent are brother and sister; and the will in question is the last will of their grandfather.

Under one clause of it, two houses and half the residue of the estate eventually "go to" the grandson "and his heirs."

And, under the next following clause, two stores and the other half of the "property" are given, devised, and bequeathed to the granddaughter, "to be held by her during her life and at her death to her heirs and assigns forever."

The sister's contention is that she takes the property absolutely. The brother's contention is that she takes a life-estate only. If so, as she is unmarried, there are great expectations for him.

It may be that the testator meant to give to the granddaughter an estate for life only. His words "to be held by her during her life" seem to indicate plainly that meaning: and the additional words "and assigns" may have meant the assigns of her heirs, or they may have been used, as sometimes they are, without an appreciation of their real meaning.

But, in so far as lands are affected, the question is not: what did the testator really mean? but is: what meaning does the law attribute to the technical words which he used?

And there can be no doubt about that: it is a rule of law that where an estate is devised to the heirs of a person to whom a prior estate of freehold has been given, the heirs take by descent and not by purchase, and that an estate in fee simple is created in the ancestor.

So that, if the testator meant that the granddaughter should take absolutely, she so takes because of such meaning; whilst, if his real intention was that she should take for life only, he has defeated that intention by using words which carry the fee simple.

This part of the case presents no difficulty, because, though there have been judicial efforts from time to time to give effect to the intention in one way and another, the Judges have always been brought back to a full observance of the rule by the highest tribunal. A quite modern affirmance, emphatic if, indeed, not also enthusiastic, of the rule, is to be found in the case, in the House of Lords, of *Van Grutten v. Foxwell*, [1897] A.C. 658.

Another part of the case, however, is not free from difficulty, though very little was said upon it in the argument. A considerable part of the property in question is not land; and the difficulty lies in the question: what rule is to be applied to the chattel property?

In the case of *Smith v. Butcher* (1878), 10 Ch. D. 113, it was held that the words "lawful heir or heirs," in the will in question in that action, did not mean next of kin in a gift of personalty, and so it was held that the rule of law applicable to lands, or any analogous rule, was not applicable to the case.

In the case of *Comfort v. Brown* (1878), *ib.* 146, the gift, or rather one of the gifts, was of leaseholds and freeholds together for life and afterwards eventually to the right heirs of the life-beneficiary forever: and in that case it was said that the rule of law applicable to lands applied and that there were hundreds of instances "in which the same rule had been applied to personal estate."

The result is, I suppose, this: If the words used really mean the next of kin, then a rule similar to that applicable to lands applies, and the beneficiary for life takes absolutely. When the words "next of kin," or equivalent words, are not used, the first question must be: do the words used mean next of kin? If so, the analogous rule applies.

In this case realty and personalty are comprised in the one gift. If the testator's meaning were that the beneficiary should take absolutely, if the words "and assigns" sufficiently indicate that intention, then the brother's expectations are gone.

And, if not, it is plain that the testator meant that the land and goods should go in the same manner; that his intentions would be defeated if they were severed: and, being obliged to hold that the testator gave the land to the granddaughter absolutely, I cannot but hold that the goods go in the same manner. What he has joined together as one I decline to put asunder: see *De Beauvoir v. De Beauvoir* (1852), 3 H.L.C. 524.

The answer to the executor's inquiry is: Louisa Tipling took the property, devised and bequeathed to her, absolutely.

There shall be no order as to costs; though the applicant as executor had a right to make this application, in it he was an active litigant in his own personal interests, and as such has failed;

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and so in the matter of costs is not to be treated altogether as a mere litigant, in his own interests, who has failed; nor as an executor seeking impartially to perform his duties properly; leaving him as to costs as nearly as possible half way between the two positions, right seems to me to be done towards him; and no wrong to the respondent, out of whose share of the estate all costs of this application would be payable but for the dual character of it.

After 10 days, if no appeal be taken against these rulings, an order, for payment out of Court of the moneys in Court to the credit of the estate, in accordance with such rulings, may be taken out.

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June 4.

[SUTHERLAND, J.]

FERGUSON V. EYER.

*Contract—Sale of Lumber in Mill-yards—Written Agreement—Whole Contract—Invoice—Inspection—Property Passing—Destruction of Lumber by Fire—Cheque Given for Price before Fire—Payment Stopped after Fire—Action on Cheque—Fire Insurance—Payment to Vendor—Action Partly for Benefit of Insurers—Right of Vendor to Maintain—Counterclaim—Negligence—Warehouse Receipt—Bank Act, 53 Vict. ch. 31, sec. 2 (d.)—Gratuitous Bailee—Reasonable Care—Cause of Fire—Condition of Engine in Yard—E.S.O. 1897, ch. 267—Evidence Negating Negligence.*

The plaintiffs, by writing dated the 14th June, 1910, agreed to sell to the defendant their "cut" of white pine lumber, in the yards of the T. company, "f.o.b. T.," at fixed prices for different grades, and according to terms of payment and delivery specified. Negotiations had been carried on before the written document was prepared, and the defendant sought to shew that it did not contain the whole agreement. The defendant had inspected the lumber before the agreement was made, an invoice of the lumber ready for delivery was sent by the plaintiffs to the defendant, and on the 27th June, the defendant sent to the plaintiffs' bankers a cheque for \$61,998.97, the price of the lumber according to the invoice, less 2 per cent. for cash. On the 30th June, a fire occurred in the lumber yards of the T. company, and the cut and piled lumber which was the subject of the agreement, as well as other lumber in the yards, was destroyed. The defendant stopped payment of the cheque, and this action was brought to recover the amount of it:—

*Held*, upon the evidence, that the writing embodied the whole contract between the parties; and that the property in the lumber had passed to the defendant before the fire.

At the time of the fire, the plaintiffs had existing insurance to the extent of \$50,000 upon the lumber in the yards, including that sold to the defendant. The insurance companies paid the plaintiffs the full amount of \$50,000, and entered into an agreement with them, reciting that the total loss was \$82,972.15, the portion thereof pertaining to the lumber sold to the defendant \$63,264.25, and providing that the plaintiffs should sue the defendant upon his cheque, and, if successful, should pay to the insurance companies the surplus remaining after satisfying the plaintiffs' own loss and their costs and expenses:—

*Held*, that the plaintiffs might properly bring the action upon the cheque, even though, if the action succeeded, the insurance companies might benefit thereby; and the plaintiffs were entitled to judgment for the amount of the cheque.

*Held*, also, having regard to the fact that a warehouse receipt for the lumber sold was signed by the plaintiffs and given to the defendant, which receipt stated on its face that it was to be regarded as a receipt under the provisions of the Bank Act, 53 Vict. ch. 31, and having regard to the meaning given by that Act, sec. 2 (*d.*), to the expression "warehouse receipt," that the plaintiffs were, at the time of the fire, gratuitous bailees for the defendant of the lumber sold, and were not bound to exercise more than reasonable care and diligence.

The T. company (defendants by counterclaim) operated on rails in their yards a small engine, equipped with boiler, smoke-stack, ash-pan, etc. It was not a standard railway engine such as used on ordinary railways, but one of a smaller kind, used in mill-yards:—

*Held*, that the Act to preserve the Forests from Destruction by Fire, R.S.O. 1897, ch. 267, had no application to a mill-yard and an engine running upon rails therein.

And *held*, upon the evidence, that the plaintiffs and their co-defendants by counterclaim had shewn that there was no such want of reasonable care on their part of the lumber in question as a prudent man would exercise with regard to his own property, and had negatived the charge of negligence made against them in the counterclaim.

ACTION to recover the amount of a cheque drawn by the defendant upon a chartered bank, in favour of the plaintiffs, for \$61,998.97.

The cheque was dated the 27th June, 1910, and was given in payment for the plaintiffs' "cut of white pine lumber," sold by the plaintiffs to the defendant upon the terms of a written agreement of the 14th June, 1910.

The action was commenced in November, 1910; the trial was delayed for unavoidable reasons.

The lumber was sold as in the yards of the Tomiko Mills Limited, in the district of Nipissing, and was there on the 30th June, 1910, when a fire occurred in the mills and yards, which destroyed the whole of the lumber. The cheque had not then been presented, and the defendant stopped payment of it.

The defendant counterclaimed against the plaintiffs and the Tomiko Mills Limited for damages for negligence in causing the fire, and, in the alternative, for an account of the insurance moneys which they had collected or should have collected in respect of the lumber destroyed.

The action and counterclaim were tried by SUTHERLAND, J., without a jury, at Toronto.

*R. McKay*, K.C., for the plaintiffs.

*W. N. Tilley*, K.C., for the defendant.

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June 4. SUTHERLAND, J.:—The plaintiffs are a firm of lumbermen, doing business under the name of Ferguson & McFadden, of which the individual members are George B. Ferguson, William Anderson, and James Joseph McFadden.

The action is on a cheque and arises out of a written contract dated the 14th June, 1910, for the sale by the said firm to the defendant of "their cut of white pine lumber" in the yards of the Tomiko Mills Limited, in the district of Nipissing, the lumber at the time being partly cut and partly in the form of logs in the water. A small portion of the cut for the year in question had been already sold by the plaintiffs to other persons; and though, at the trial, some stress was attempted to be laid on this by the defendant, it seems reasonably clear that the defendant was aware of the fact and that the parties entered into the contract in question with it in mind.

The action was commenced by a writ issued on the 2nd November, 1910, was partly tried by another Judge, and considerable delay more or less unavoidable has meantime occurred.

The contract on which the plaintiffs rely is as follows:—

"Toronto, June 14, 1910.

"Messrs. Ferguson & McFadden, Tomiko, Ont., agree to sell and John H. Eyer of Toronto agrees to buy their cut of white pine lumber, of about seven million feet, as follows:—

"F.O.B. Tomiko.

"1" & thicker Box & Better 10-16 ft. B.M. at...\$25.50

"1" & " Good Shorts 6-9 " " at...\$25.50

"1" & " Com & Drg 6-9 " " at...\$11.50

"1 x 10 x 12 Mill Culls 10-16 " " at...\$14.50

"1" & thicker " " 6-16 " " at...\$11.50

"1" & " Dead Culls " " " at...\$ 8.00. 154M.ft.

"Terms:—Payment by purchaser, cheque for lumber cut to June 8th as per estimate, less a discount of two per cent. Balance of lumber to be cut by October 1st, 1910, on the date named as near as practical, and settlement of same to be made with option by purchasers—2% 30-days from October 1st, 1910, or four months note from October 1st, 1910.

"It is further agreed to give a yard receipt if required. All lumber not properly manufactured to be laid out."



Negotiations had been carried on prior to the execution of this contract, and the defendant seeks to shew that it does not contain the whole agreement, and to explain or vary it, or engraft upon it terms not actually appearing therein, but said by him to have been part of the actual contract as disclosed in or evidenced by such previous negotiations and the correspondence connected therewith.

The correspondence referred to began with an initial offer made to the plaintiffs on behalf of the defendant by one H. G. McDermid, an agent or employee of the latter, and it is perhaps desirable also to set it out in full:—

“Toronto, June 4, 1910.

“Subject to the approval of John H. Eyer, I offer you for the product of your logs, sawn or to be sawn, during the season of 1910 at Toronto, as follows:—

“Box & Better 4” & wider 10 feet and longer.....	\$25.50
“Mill Culls 4” and wider 6 feet and longer.....	\$11.50
“10” & 12” mill culls.....	\$14.50
“Mill run shorts 4” & wider 6 to 9 feet long.....	\$11.50
“Mill culls in the 10” & 12” mill run.....	\$14.50
“Mill culls in all other “ “.....	\$11.50
“Dead culls 4” & wider 6 feet and longer (less 500M sold). \$	8.00
“F.O.B. Cars Toronto, Ont.	

“Any lumber not now sawn to be cut and graded according to instructions of John H. Eyer.

“Terms to be cash less 2% on invoice for lumber already in pile, balance cash on the 15th of each month for preceding months sawing less 2%.

“Ferguson and McFadden’s inspection and measurement to be final.

“Insurance to be assumed by John H. Eyer from date of each payment.

“Where there is any extra handling done, John H. Eyer is to pay the cost of same except when there are any mill culls to be laid out of the Box & Better. John H. Eyer is to ship the mill culls found in the Box & Better pile run if possible.”

“H. G. McDermid, for John H. Eyer.”

On the 6th June, the defendant sent a telegram to the plaintiff McFadden as follows: “I approve of McDermid’s proposition

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subject to final examination Monday thirteenth. Wire if you accept." To which McFadden on the same day replied as follows: "Anderson, my partner, leaving for England this week, and we prefer having matter closed before he leaves. Answer here if you will do so by Thursday."

The defendant answered this on the 7th as follows: "Cannot do anything further until examination Monday. Is offer satisfactory?" And received the following reply: "Your offer satisfactory to make examination next Monday. If however you can make examination this week it will be appreciated."

On the 8th June, McFadden sent a copy of the offer and correspondence from Ottawa to his firm at Tomiko, enclosed in the following letter:—

"Enclosed please find offer of McDermid for J. H. Eyer, along with approval of Mr. Eyer by wire with my replies on back of messages, where it now rests. You will note I was trying to close it before Anderson's departure. You had better keep McDermid's offer and those telegrams, as, if Eyer is satisfied when he sees the lumber, all that will be necessary to complete contract will be for him to give you a letter while he is there, and you can then invoice him for stock on hand. Likely he may say he wants to go home and figure up etc., which means of course more time. However, you may just say to him that I have written you that if he is satisfied to just leave you the letter. I will be about Sudbury or Webbwood next Monday. If I could be at Tomiko I would like it, but I cannot be there. Keep McDermid's offer and send me copy to Webbwood."

It would appear from this correspondence as if the parties, apart from the inspection of the lumber, had come to an understanding which, aside from what subsequently occurred, might have formed the basis of a definite contract on agreed terms.

On the 13th June, the defendant, accompanied by one of his lumber inspectors named Clary, went to the mill-yard to make an inspection of the lumber already cut and piled therein. Thereafter he and the plaintiff Ferguson, on the same day, had a conference and discussion at the mills about the proposed contract. The defendant suggested, amongst other thing, a change in the terms of payment from those mentioned in the original offer. Ferguson appeared to be willing to agree to this as suggested, and to com-

plete and execute a contract there and then. On this being suggested to the defendant, however, he said: "No, I am going down and I will sleep over it and prepare a contract." On the day following or by the 16th at all events, with the knowledge he had of the original proposal and the intermediate correspondence and conference, he drew the contract of the 14th June already referred to.

On the 16th, he wrote the following letter to the plaintiffs:—

"With reference to this season's cut at Tomiko, which stock I inspected the other day, I herewith enclose two copies of agreement which I trust you will find in order. If you will therefore kindly sign the acceptance of one copy and return with yard receipt shewing an estimate of the full quantity that is cut at the present time and in the yards to my order, you will greatly oblige."

The copies referred to therein were signed by the plaintiffs, and on the 18th June they wrote to the defendant stating they were enclosing "one copy of agreement completed and also an invoice of the lumber purchased by you to be shipped to your order as per yard estimate of June 8th. I have instructed our Mr. Duff to have your mark put on the piles any time you wish. Kindly send your cheque to me here instead of to Tomiko."

On the 27th June, the defendant wrote to the plaintiffs as follows: "At the request of your Mr. McFadden, I am sending cheque to the manager, Bank of Ottawa, Renfrew, for \$61,998.97 in payment of your invoice June 17th for \$63,264.25 less discount of \$1,265.28. This payment as per our contract of June 14th. Your acknowledgment will oblige. Also send two copies of invoice which you sent us dated the 17th inst." And on the said day he wrote to the manager of the Bank of Ottawa at Renfrew as follows: "I enclose herewith my cheque No. 7241 for \$61,998.97, which is to be placed to the credit of Ferguson & McFadden. Your acknowledgment will oblige."

On the 30th June, 1910, a fire occurred at the mills, and the cut and piled lumber which is the subject-matter of this action was burned. The cheque, through some delay in postal transmission, not very clearly accounted for in the evidence, not having in the meantime been put to the credit of the plaintiffs in the bank, the defendant stopped payment thereof.

The plaintiffs contend that they made the contract in question on the 14th June, 1910; that the lumber in the yard was duly

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inspected and measured by the defendant, was invoiced to him, that a yard receipt (or warehouse receipt) signed by them was sent to him at his request, and thereupon the cheque in question was sent in payment for the amount mentioned in the invoice, less a discount of 2%, amounting to \$1,265.28 allowed by the contract for cash payment.

They claim, therefore, payment of the amount of the cheque, namely, \$61,998.97, with interest, or, in the alternative, the sum of \$63,264.25, the amount of the invoice, with interest thereon.

The action as originally constituted was by the plaintiffs Ferguson and McFadden against the defendant, Eyer. An amendment was applied for and obtained by the defendant (by original action) and he became plaintiff by way of counterclaim and the plaintiffs (by original action) and the Tomiko Mills Limited defendants by counterclaim, the latter company being added on account of a claim by the defendant (by original action) of alleged negligence on their part causing the fire referred to. It is a saw-mill company, of which the main stockholders are the individual members of the plaintiffs' firm, though there are other stockholders.

The defendant contends that what happened, before the fire in question, between the plaintiffs and himself, did not effect an actual sale and change of ownership and possession, and was only intended to be and only was an agreement to sell; and that, before the sale was completed, and before appropriation, acceptance, measurement, delivery, and payment, and while the plaintiffs were still owners in possession thereof, the lumber in question was destroyed by fire—the consideration for the defendant's cheque sued on failed, and thereupon the plaintiffs as owners claimed, from the several insurance companies with whom they were insured, indemnity for their loss by reason of the destruction of the lumber, and collected from them sufficient to cover such loss and to pay for the lumber. He alleges that this action is brought and prosecuted by the plaintiffs on behalf of and for the benefit of such insurance companies. He further alleges that it was part of the proposed contract between the plaintiffs and himself that the lumber was fully insured, and that the plaintiffs would keep it so insured to protect all parties to the contract against loss until the plaintiffs were paid therefor, at which time the insurance policies should be

taken over by the defendant, or he would re-insure for his own benefit.

He alleges further that, when claiming for the insurance moneys, the plaintiffs represented themselves to be the owners of the lumber destroyed, and in consequence are estopped in this action from claiming against the defendant that the title in the lumber had passed to him.

He also alleges that the fire was caused and the lumber destroyed by the negligence of the plaintiffs, or one of them, in the operation of the saw-mill of the Tomiko Mills Limited, defendants by counterclaim, and the yards connected therewith, and that such negligence consisted in operating in the said yard an engine improperly and negligently constructed and out of repair, in that it did not have efficient screens or guards properly placed so as to prevent sparks and fire escaping from the "smoke-box, smoke-stack, fire-box and ash-pan," and improperly and negligently permitting sawdust and other inflammable materials and refuse to accumulate and remain in the yards without taking proper steps to watch and guard against fire starting or spreading.

A further ground of alleged negligence was that the plaintiffs, having had knowledge of other fires starting in the yard, took no precautions to prevent further fires starting or spreading therein. The defendant accordingly asks, in the event of it being found that the plaintiffs are entitled to succeed on their claim herein, that he should have judgment against them by way of counterclaim for the sum of \$63,264.25, being the value of the lumber so negligently destroyed by the plaintiffs, or, in the alternative, that they account to him for the insurance moneys which they have collected or should have collected in respect of the lumber so destroyed.

The Tomiko Mills Limited, defendants by counterclaim, deny that they are under any obligation or duty to the defendant in connection with the operation of their engine in their yard, and assert that the engine was properly operated. They further allege that the defendant Eyer had full opportunity of examining their lumber-yard and the appliances therein, and voluntarily allowed the lumber in question to remain stored thereupon, with full knowledge of the conditions as they existed, and took the risk of allowing the lumber so to remain.

While in his evidence at the trial the defendant seemed at times

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to hark back to his original offer, and to claim that it was in effect, and apart from the change in the terms of payment, the real contract intended to be made and actually entered into between the plaintiffs and himself, his evidence at other points did not bear out this contention.

With reference to the agreement of the 14th June he said:—

“Q. That was, you say, drawn by yourself? A. Yes.

“Q. Sent by the letter we have here and accepted as the final deal between yourself and Ferguson and McFadden for the sale of this lumber? A. Yes.

“Q. And you went back to Toronto and you drew that agreement between the parties? A. Yes.

“Q. And you set that up, intending that to be the final agreement if it was signed by McFadden? A. Yes.”

When the proposal of the 4th June and the contract of the 14th June are compared, there are a number of marked differences (apart from the change in the terms of payment), some of which are beneficial to the defendant. For example: in the proposal there is the provision that “Ferguson and McFadden inspection and measurement to be final.” This is omitted from the contract. In the proposal there is this term: “Insurance to be assumed by John H. Eyer from date of each payment.” This is omitted in the contract. In the contract is found the following: “It is further agreed to give a yard-receipt if required. All lumber not properly manufactured to be laid out.” These terms were not in the proposal.

Aside from the difficulties standing in the way of the defendant of admitting extrinsic evidence to “contradict, vary, add to, or subtract from” its terms, in the case of a contract reduced to writing and signed by the parties, it appears to me that where, as here, the defendant refused on the 13th June to enter into an agreement embodying the terms set out in writing in the original proposal made by him, elected to go away and further consider the matter, and then prepared a writing containing the definite and final terms of the contract he proposed to make with the plaintiffs, he cannot later be heard to say that such contract, when signed by them and himself, does not embody the actual contract between them. Shortly after, in his letter of the 27th June, in which he enclosed the cheque in question, he makes reference to “our contract of June 14th.”



I am therefore of the opinion that the agreement of that date was the contract entered into between the parties under which their rights are to be determined; and I am also of the opinion that the property in the lumber, in payment whereof a cheque was sent by the defendant, had, at the time of the fire, passed to him, and thereafter the lumber was at his risk as to loss by fire. The lumber was cut and piled in the yards of the defendant company in a "deliverable state." The defendant had inspected it, and an invoice, shewing in detail the kinds and quantities of the lumber, had been sent by the plaintiffs to the defendant. He had asked for and obtained a yard receipt. He was informed by letter that his mark would be put on the lumber in the piles at any time he wished. Thereupon he sent the cheque in question in payment of the invoice "as per our contract of June 14th." But it is said the contract contained the term "F.O.B. Tomiko." I do not think this affected the question of the passing of the property to the defendant. It was not something to be done by the vendor initially, so to speak, and before the sale was completed and the property should pass to the vendee, but rather something to be done by the vendor, but postponed for the convenience of the vendee to a later date, and to be then done upon his request or order. The sending of the cheque, when it was known by the defendant that the lumber was not "F.O.B. Tomiko," indicates that such was the defendant's own understanding.

At the time of the fire, the plaintiffs had existing insurance upon lumber, consisting not only of that in question herein, but other lumber owned by them in the yards, to the extent of \$50,000, in the following companies:—

Two policies in the London Liverpool & Globe Insurance Company for \$17,500 and \$10,000 respectively.

Two policies in the Mercantile Fire Insurance Company for \$10,000 and \$2,500 respectively.

One policy in the London and Lancashire Fire Insurance Company for \$10,000.

The policies contained the following clauses:—

"1. On lumber, timber, pickets, staves, heading, lath-posts, ties, and other wood products, their own held in trust or on commission, or sold but not removed but not on property in which the assured are not directly or indirectly interested in the event of

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loss by fire, while piled on the piling grounds of the Tomiko Mills Limited, at Tomiko, Ontario.

"2. The premium having been reduced in consideration of this condition, the insured shall, during the currency of this policy, maintain insurance concurrent with this policy on each and every item of the property insured, to the extent of at least 100 per cent. of the actual cash value thereof; and, if the insured shall not do so, the company shall only be liable for the payment of that proportion of the loss for which the company would be liable if such amount of concurrent insurance had been maintained.

"3. In the event of loss arising on the property insured by this policy, it is hereby understood and agreed that *the cash market value* thereof on the day of the fire on its location as above described shall be the basis of the adjustment adopted, anything herein to the contrary notwithstanding."

The proofs of claim filed with the insurance companies were verified by the affidavits of McFadden, from which I quote certain paragraphs as follows:—

"11. The loss sustained by the insured on the said lumber was *total*, all of the said lumber as shewn in schedules B and C hereto, except that shewn on schedule B as belonging to De La Plante, not burnt, having been destroyed by the said fire.

"12. That the total amount of the loss of the said Ferguson & McFadden upon the said lumber is the sum of \$82,972.15, the said loss being determined upon the *cash market* value of the said lumber on the day of the fire on its location as above described.

"13. All the lumber set forth in schedule C hereto *had been sold to one J. H. Eyer*, but *had not been removed*, and has *not been paid for* by the said Eyer."

Schedule C, referred to, is a copy of the invoice sent by the plaintiffs to the defendant with the addition of a heading as follows: "Shewing lumber the property of Ferguson & McFadden sold to J. H. Eyer but not removed."

The plaintiffs did not represent themselves in the said affidavits and proofs as still owners of the lumber, but as having sold it to the defendant, and yet claiming their right under the terms of the policies to claim and collect the insurance moneys.

The defendant contends, as already stated, that the plaintiffs had represented that the lumber in question was fully covered by

insurance, and that the plaintiffs would keep it so insured to protect him against loss. There had been negotiations about insurance between the parties, the plaintiffs being desirous of realising as much as possible from the unearned premiums, either by way of assignment in case the defendant took over the insurance or otherwise by cancellation; and the defendant, on the other hand, considering the question from the standpoint of whether it would be better for him to take over the existing or himself place new insurance.

Upon the evidence, I am unable to find that a representation was made by the plaintiffs to the defendant that the lumber was fully insured or would be kept insured in whole or part for the benefit or protection of the defendant. I find that, though negotiations with respect to insurance had been going on, no arrangement had been come to up to the time the fire occurred. The facts that the defendant's agent made reference to the insurance in the original proposal of the 4th June, and that the defendant in the contract of the 14th June, drawn by himself, failed to do so, and that he also made no reference to it in his letter when sending the cheque, seem to emphasise this and lend weight to the denial of the plaintiffs as against the affirmation of the defendant. The plaintiffs had a right under the clause in the policies to keep them alive for their benefit after a sale and before removal, and did so. There being no term in the contract calling upon them to insure or keep insured for the defendant's benefit, even if the defendant could probably set up, as it was argued he was entitled to do, that there could be and was a collateral and verbal contract of that kind, the finding I have made is against him as to such a collateral contract having been made.

The companies paid to the plaintiffs under the policies the full amount of \$50,000, and an agreement bearing date the 14th November, 1910, was entered into between them, in part as follows:—

“And whereas a loss by fire was sustained in respect of certain of said lumber on or about the 30th day of June, 1910, whereby loss was sustained upon the said lumber to the total amount of eighty-two thousand nine hundred and seventy-two dollars and fifteen cents (\$82,972.15), of which said amount of loss the lumber the subject of the above referred to contract with John H. Eyer

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amounts to sixty-three thousand two hundred and sixty-four dollars and twenty-five cents (\$63,264.25).

"Now therefore this agreement witnesseth:—

"1. That the parties of the second part" (the companies) "pay to the said Ferguson and McFadden on the date hereof the sum of fifty thousand dollars (\$50,000), being the total amount of the policies held by the said Ferguson and McFadden in the said companies upon the said lumber as hereinbefore recited.

"2. The said Ferguson and McFadden agree that they will forthwith cause an action to be instituted against John H. Eyer upon a cheque given by him and upon the contract made by him for the purchase of the said lumber, as their solicitors may advise, and that they will duly prosecute said action.

"4. In case the said Ferguson and McFadden are successful in recovering in the said action against the said John H. Eyer, all moneys realised by them shall be applied first in payment to themselves the said Ferguson and McFadden of the balance of their loss upon the said lumber, being the difference between eighty-thousand dollars (\$80,000) and fifty thousand dollars (\$50,000), such difference amounting to thirty thousand dollars (\$30,000), with interest and their proper costs as between solicitor and client and all other proper charges and expense incurred in or about the said action or the collection of the said amount or such amount as may be collected.

"5. Any surplus remaining shall be paid over to the parties of the second part in proportion to the amounts respectively contributed by the parties of the second part to the above mentioned sum of fifty thousand dollars (\$50,000) paid to the said Ferguson and McFadden.

"6. In case the said Ferguson and McFadden should fail in said action, the parties of the second part agree that they will pay to the said Ferguson and McFadden one half the costs of the said Ferguson & McFadden incurred in connection therewith."

It has been pointed out that a contract of fire insurance differs from that of life insurance in that, while the latter is a contract to pay a definite sum on the happening of a certain event, the former is a contract to indemnify against damage caused by the event insured against up to a certain limit within which the sum payable is de-

pendent on the loss sustained. While an insured may under a fire insurance policy have a claim against the insurance company and also a claim under some other contract against some other corporation or person, as for example the claim in the present case of the plaintiffs against the defendant on the cheque in question, to both of which he may resort, if he recovers the amount of his loss from such other source, the insurer who has already paid under the policy may ask for repayment *pro tanto*. And, further, if the insured has renounced rights against others which he might have exercised, and which in that event would enure to the relief of the insurer, the latter may compel him to make good the value thereof.

*Castellain v. Preston* (1883), 11 Q.B.D. 380, was a case in which the vendor contracted with the purchaser for the sale, at a specified sum, of a house which had been already insured by the vendor. No reference to the insurance was made in the contract. Subsequent to its date, but before the date fixed therein for the completion of the contract, the house was damaged by fire, and the vendor received the insurance money from the company. Later, the purchase was completed, and the amount which had been agreed upon, without any abatement on account of the damage by fire, was paid to the vendor. It was held that the company were entitled to recover a sum equal to the insurance money from the vendor for their own benefit, and that under the doctrine of subrogation the insurer was entitled "to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on."

See also *Glasgow Provident Investment Society v. Westminster Fire Insurance Co.* (1887), 24 Scottish L.R. 691; *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q.B. 226; *Assicurazioni Generali de Trieste v. Empress Assurance Corporation Limited*, [1907] 2 K.B. 814; *Keefer v. Phoenix Insurance Co. of Hartford* (1901), 31 S.C.R. 144; *Millard v. Toronto R.W. Co.* (1914), 31 O.L.R. 526.

The plaintiffs therefore may properly bring this action upon the cheque, even though, if successful, the insurance companies may, as a result, be benefited thereby.

The yard receipt signed by the plaintiffs, which has been referred to, was not produced at the trial, but a copy in the following form (exhibit 13):—

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## "Warehouse Receipt."

"Received into store in.....warehouse.....  
 .....at Tomiko yard.....  
 quantity of lumber about of value of \$60,000 (or it may have been  
 feet) to be delivered to the order of the said Eyer or the Merchants  
 Bank.....to be endorsed hereon."

"This is to be regarded as a receipt under the provisions of  
 statute (the Bank Act) 53 Vict. ch. 31.

"The said.....is separate from and will be kept  
 separate and distinguishable from other grain, goods, wares or  
 merchandise; and is held free of all liens except storage charges."

Section 2, clause (d.), of 53 Vict. ch. 31 (D.), is in part as  
 follows: "The expression 'warehouse receipt' means *any receipt*  
 given by any person for *any goods*, wares, or merchandise, in his  
*actual, visible and continued possession, as bailee* thereof, in good  
 faith, and not as of his *own property*," and so forth.

It had been signed by the plaintiffs at the request of the defend-  
 ant, and probably also at the request of the bank and for its  
 protection, as well, in a loan which apparently it was making or  
 intending to make to the defendant. Upon it being thus signed,  
 the plaintiffs were bailees for the defendant; they could hardly  
 thereafter say that they were owners, and the defendant could not  
 well say they were. In my opinion, the plaintiffs were, at the time  
 of the fire, gratuitous bailees for the defendant. It may be that  
 the defendant company, who had been bailees in their yards for  
 the plaintiffs up to the time the latter signed the said yard or  
 warehouse receipt, were also in the position, so far as the defendant  
 was concerned, that, when he became the owner, they would be  
 responsible to him for any actual negligence on their part resulting  
 in loss to him.

If chattel property is injured or lost while in the possession of a  
 gratuitous bailee, a *prima facie* presumption is raised against him,  
 which he may rebut by proving that he was not to blame for such  
 loss or injury. He is required to shew that degree of care in the  
 custody of the chattel property "which men of common prudence  
 generally exercise about their own affairs:" Halsbury's Laws of  
 England, vol. 1, p. 531, para. 1082; "to exercise reasonable care  
 and diligence in keeping the goods entrusted to his charge (that is



to say, such care and diligence as persons ordinarily use in their own affairs):" Beal on Bailments, p. 56.

*Bullen v. Swan Electric Engraving Co.* (1907), 23 Times L.R. 258, was a case in which certain engraving plates were left in the custody of the defendants, under such circumstances as would impose a duty upon them of taking the care a reasonable man would take of his own goods. While in their custody, the plates were taken away by some one and lost. The defendants proved that they were kept in a proper place and under the charge of proper persons, and that the arrangements were reasonably sufficient, though they were unable to shew how the plates were actually taken away. At p. 259 Sir Gorell Barnes says: "They were left, therefore, to the consideration of well-known principles of law. One of these was that a gratuitous bailee must shew that the loss occurred through no want of reasonable care on his part—that was to say, as much care as a prudent man would use in keeping his own property. The plaintiff's contention was that the defendants must shew that the loss happened in some way which they could account for, and that in relation to that particular matter and at that particular moment of time proper care was taken. No authority had been cited for such a proposition as that. It was enhancing the burden of proof upon a defendant to an absurd extent if he had to prove not only that he had taken every reasonable care but also that he knew how the loss happened."

The Tomiko company operated on rails in their mill-yard a small engine or motor, equipped with boiler, smoke-stack, ash-pan, etc. It was not a standard railway engine such as used on ordinary railways, but a smaller kind used in such places as mill-yards and the like. It had been purchased a couple of years before by the company, and was at that time a second-hand engine in apparently good condition.

It was contended that the Act to preserve the Forests from destruction by Fire, R.S.O. 1897, ch. 267, and amendments, applied to a mill-yard such as that in question, and that in consequence the engine in question should have been provided with all the most approved and efficient means used to prevent the escape of fire from the ash-pan and the smoke-stack. By sec. 9 of the said Act, "all locomotive engines used on any railway which passes through any fire district or any part of a fire district" are required to be

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provided with such up to date appliances. It is said that this yard was situate in a fire district.

I am of opinion, however, that the Act has no application to a mill-yard and to an engine running upon rails therein. The title of the Act and its character throughout shew that it was meant to apply to locomotive engines running on ordinary railways, passing through woods or forests, and that the precautions and requirements mentioned therein were for the protection of such forests. I cannot at all think either that the same high standard of engine as would be appropriate and necessary on a standard railway could necessarily be insisted upon in the case of a small engine or motor operating in a mill-yard. The engine had been inspected from time to time, while operated by the Tomiko company, as to the condition of the boiler, and found satisfactory.

This may not be of importance or relevant except to shew that the usual and necessary precautions were not omitted. Surveys or inspections had been made on behalf of the underwriters to fix the lumber-yard rating from time to time. The yard was equipped with certain fire protection appliances, such as a duplex steam-pump in the mill and 600 feet of hose. A watchman was employed but only at night and for the mill premises.

The insurance rating, which at one time had been \$1.90, had been reduced to \$1.81, at which it stood when the fire occurred. While it was charged by the defendant that the ash-pan in the engine was not safe or of a standard type, and might in consequence drop coals and cause fires, and particularly if refuse were left lying on or near the tracks in the yard, I think I may say that there was no evidence offered at the trial from which it could be reasonably inferred that the fire in question originated in that way.

The main defect in the engine alleged by the defendant, and to which evidence was particularly directed, was that there was no spark arresting plate or appliance in the smoke-stack and that in consequence sparks or coals were emitted from the stack on the occasion in question, which, falling upon the lumber, caused the fire. The exact manner in which the fire did start was not shewn in evidence. Whilst smoking was prohibited in the yards, there was evidence that men employed there had smoked therein, desisting only when discovered and rebuked and forbidden. The plaintiffs on their part suggested this as a possible and probable

cause of the fire. As a matter of speculation from the whole evidence, I am inclined to think it more likely that the fire started from sparks emitted from the smoke-stack than in any other suggested way. I cannot find, however, as a fact, that this was proved to have been the case. It is not necessary for the plaintiffs to prove how the fire occurred to exonerate themselves, so long as they shew that they were not negligent.

Two kinds of spark arresting devices were referred to in the evidence, one a screen of No. 4 mesh, made in the form of a round, flat piece covering the entire top of the stack and projecting half an inch beyond the rim, and so equipped that by slackening a bolt the screen could be swung to the side of the stack, which was often done, particularly in starting the engine, when a stove-pipe was inserted in the top of the stack temporarily to increase the draft. When this form of screen was in place, it was not easy for an observer standing on the ground to discover whether there was or was not a screen on the stack. The other kind was what was termed a bonnet or projecting screen, which would be quite visible at all times. The underwriters had suggested this latter kind shortly before the date of the fire.

The evidence was conflicting as to which was the safer device, or whether the bonnet-screen was in fact any safer than the other. The underwriters had, however, suggested the use of the bonnet-screen, probably because it could be seen more plainly when an inspection occurred, and had offered a reduction in the rate from \$1.81 to \$1.72 if it were used.

One Calder, an experienced inspector for the underwriters, and who had previously made surveys for rating this yard, had made an inspection shortly before the fire and prepared a written report dated the 18th May, 1910. This report contained the following questions and answers:—

“Q. Do you operate upon the above or any track in your yard any steam, gasoline, electric or other motor? A. Yes.

“If so what kind? A. Steam.

“If steam motor is used, has each motor a close ash-pan? A. Yes.

“Q. Has each steam motor an outside bonnet spark arrester? A. No, inside.”

The evidence was conflicting as to whether this inside spark arrester on the top of the stack was in use at and prior to the time of

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the fire. While some doubts as to this are raised in the evidence and in certain correspondence between the plaintiffs and certain manufacturers with whom they were negotiating for a bonnet spark arrester, on the whole evidence, and particularly in view of the evidence and report of Calder, I have come to the conclusion and find that it was, and that it was reasonably fit and safe for the purposes intended. A bonnet spark arrester was in use on the engine at one time for a short period, but it was at a date subsequent to the fire.

Experts testified on behalf of the plaintiffs that the engine as described with a spark arrester in the stack of the kind indicated and in use before the fire was of the usual kind and reasonably safe for the purposes for which it was used. Other experts testified that such engine so equipped was a dangerous one and apt to cause fires in a lumber-yard.

There was some evidence that there had been a fire in the yards not long before, and perhaps trifling fires at other times.

On the whole evidence, however, I cannot come to the conclusion that there had been anything in the nature of such occasional fires as had occurred in the operation of the yard, or from any other cause, which would suggest to the plaintiffs that the engine was defective in the matter of the plate or screen in the stack or otherwise which ought to have put them on the alert and caused them to make better provision. The principle enunciated in *Schwoob v. Michigan Central R.W. Co.* (1905), 9 O.L.R. 86, affirmed (1905) 10 O.L.R. 647, and (1906) 13 O.L.R. 548, may well be applied, namely: that "negligence cannot be found where the opinion evidence is in conflict and reputable skilled men have approved of the method called in question."

The defendant had been at the mill inspecting the lumber before he closed his contract, and saw the general condition of the yard and the appliances therein. The plaintiffs had other lumber of their own stored in the yard, the remnants of cuts of previous years. They had apparently considered the engine and fire protection appliances reasonably safe for the safeguarding of their own property. The inspectors of the underwriters were apparently of the same opinion.

The question to be determined by me then is: have the plaintiffs shewn that there was no want of such reasonable care on their part

of the lumber in question as a prudent man would exercise with reference to his own property? With some hesitation, I have come to the conclusion that they have, and that they have negatived the charge of negligence preferred against them by the defendant. Where I have on this question of negligence spoken of the plaintiffs, the company is also intended, both being strictly on this question defendants by way of counterclaim.

The plaintiffs will therefore have judgment for the amount of the cheque sued on, namely, \$61,998.97, with appropriate interest and costs, and the counterclaim will, as to both them and the company defendants by way of counterclaim, be dismissed with costs.

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[MULOCK, C.J.Ex.]

A. J. REACH CO. v. CROSLAND.

*Assessment and Taxes—Easement—Right of Way Appurtenant—Interest in Land—Extinction by Sale and Conveyance of Servient Tenement for Taxes—Municipal Act, R.S.O. 1897, ch. 223, sec. 2 (8)—Assessment Act, R.S.O. 1897, ch. 224, secs. 7, 149.*

A right of way appurtenant exists solely for the benefit of the dominant tenement, and apart therefrom has no existence. It is not assessable as a separate interest, nor is it covered by an assessment of the dominant tenement; but the assessment of the servient tenement creates a charge on every interest in the land itself: *vide* the definition of land in clause 8 of sec. 2 of the Municipal Act, R.S.O. 1897, ch. 223; and secs. 7 and 149 of the Assessment Act, R.S.O. 1897, ch. 224, as to exemptions and liens.

Land over which the defendants claimed a right of way was sold for taxes in 1901 and conveyed to the purchaser in 1902:—

*Held*, that the taxes assessed against the land became a charge upon that land and every interest in it, including any right of way to which the defendants might have been entitled; and the sale and conveyance of the land for taxes extinguished that right.

*Tomlinson v. Hill* (1855), 5 Gr. 231, *Soper v. City of Windsor* (1914), 32 O.L.R. 352, and *Re Hunt and Bell* (1915), 34 O.L.R. 256, applied and followed.

ACTION for a declaration that the defendants were not entitled to a right of way over a strip of land owned by the plaintiffs, being the southerly 10 feet of the plaintiffs' lot fronting on Macdonald avenue, in the city of Toronto, and for further relief. The defendants were the owners of land fronting on the north side of Rideau avenue, which intersects Macdonald avenue; the defendants' land extending northward to the southerly limit of the plaintiffs' land.

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The strip extended easterly from Macdonald avenue to the defendants' land.

The action was tried by MULOCK, C.J.Ex., without a jury, at Toronto.

*W. J. Tremear*, for the plaintiffs.

*J. H. Cooke*, for the defendants.

June 6. MULOCK, C.J.Ex.:—The plaintiff company are the owners of certain lands situate on the east side of Macdonald avenue, in the city of Toronto, a street intersected by Rideau avenue, and the defendant Elizabeth Crosland owns certain other lands situate on the north side of Rideau avenue and extending northward to the southerly limit of the plaintiffs' land. She and her husband, the other defendant, claim to be entitled by prescription to a right of way, between Elizabeth Crosland's land and Macdonald avenue, over a certain strip of land owned by the plaintiffs, being the southerly 10 feet of their land and extending easterly from Macdonald avenue to the defendants' land.

The plaintiffs contend that the defendants are not so entitled, and ask for a declaration to that effect and for further relief. Amongst other things, the plaintiffs allege that the strip of land over which the defendants claim such right was sold for arrears of taxes and purchased by the Municipality of the City of Toronto on the 24th April, 1901; that, by a tax-deed bearing date the 1st October, 1902, the Mayor and Treasurer of the City of Toronto sold and conveyed the said strip to the said city corporation; and that the effect of the sale and conveyance was to extinguish whatever right of way over the strip of land the defendants may have possessed.

The defendants' counsel argued that the alleged easement was not assessable for taxes; and that, by the tax-deed, the city corporation acquired the land subject to the defendants' right of way. Assuming that, at the time of the tax-sale, the defendants were entitled to a right of way appurtenant to their lands over the 10-foot strip, the question is, whether it was extinguished by the tax-sale and conveyance to the city corporation.

The statute (an Act respecting the City of Toronto) 3 Edw. VII. ch. 86, sec. 8, declares that "all sales of land within the said



city, up to and including the one held in the year 1902, and purporting to be made for arrears of taxes in respect of the lands so sold are hereby validated and confirmed, notwithstanding any irregularity in the assessment," etc.

The statute (an Act respecting the City of Toronto) 7 Edw. VII. ch. 95, sec. 9, declares that "all sales of lands within the Municipality of the City of Toronto, made prior to the 31st day of December, 1904, purporting to be made by the corporation of the said city for arrears of taxes in respect of lands so sold are hereby validated and confirmed, and all deeds of lands so sold executed by the mayor and treasurer and clerk of the said corporation purporting to convey the said lands so sold to the purchaser thereof or his assigns, or to the said corporation, shall have the effect of vesting the lands so sold and conveyed and the same are hereby vested in the purchaser or his assigns, and his and their heirs and assigns, or in the corporation and its assigns, as the case may be, in fee simple, free and clear of and from all right, title and interest whatsoever of the owners thereof at the time of such sale or their assigns and of all charges and encumbrances thereon except taxes accrued after those for non-payment whereof the said lands were sold."

At the sale of land for taxes in 1901, the strip of land in question was purchased by the Corporation of the City of Toronto; and the Mayor and Treasurer of the said city, by deed bearing date the 1st October, 1902, did "grant, bargain and sell unto the Corporation of the City of Toronto, its successors and assigns," the strip of land in question.

By deed bearing date the 15th June, 1909, made in pursuance of the Act respecting Short Forms of Conveyances, the Corporation of the City of Toronto, in consideration of \$225, did grant unto one John G. Kent, in fee simple, the strip in question; and the plaintiffs derived title thereto through a subsequent purchaser from the said John G. Kent. Thus the plaintiffs are now entitled to whatever passed to the Corporation of the City of Toronto by the deed of the 1st October, 1902, or to John G. Kent by the deed to him of the 15th June, 1909.

The Assessment Act in force at the time of the tax sale and conveyance was R.S.O. 1897, ch. 224; and sec. 7 enacts that, subject to certain exemptions enumerated therein, all property in the

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Province shall be liable to taxation. A right of way appurtenant is not one of the exemptions, and therefore is an interest in land not entitled to escape taxation, and must be assessed as a separate interest in land or be included in the assessment of land. Whatever is assessable under the provisions of the Assessment Act is saleable for arrears of taxes; but a right of way appurtenant cannot be transferred by tax-deed apart from the dominant tenement. It exists solely for the benefit of the dominant tenement, and apart therefrom has no existence. Thus, not being saleable as a separate interest, it is not as such assessable. Nor is it covered by an assessment of the dominant tenement. By sec. 149 of the Assessment Act, taxes are made a special lien on the land taxed, not on any other land. A right of way appurtenant is not physically part of the dominant tenement, but an easement which proceeds out of other land. The taxes in respect of the dominant tenement do not become a lien on the servient tenement or any interest therein. Therefore, assessment of the dominant tenement does not constitute assessment also of an easement appurtenant thereto.

There remains but one other possible means, for taxation purposes, of reaching such an interest in land, namely, by assessment of the servient tenement; and, in my opinion, the assessment of the servient tenement creates a charge on every interest in the land itself. Clause 8 of sec. 2 of the Municipal Act, R.S.O. 1897, ch. 223, thus defines "land:": "'Land,' 'Lands,' 'Real Estate,' 'Real Property,' shall include lands, tenements and hereditaments, and any interest or estate therein, or right or easement affecting the same."

In *Tomlinson v. Hill* (1855), 5 Gr. 231, the plaintiff sought to establish a claim for dower in lands acquired by the defendant through a sale and conveyance for taxes. In dismissing the claim, the late Chancellor Blake said: "The only question is, whether the conveyance so executed is a bar to the plaintiff's claim. It is quite clear, I think, that the land tax is made a charge upon the property itself, to the payment of which all persons having any interest in the land are bound to look; and it follows that a conveyance by the sheriff in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title under the Act of Parliament."

In *Soper v. City of Windsor* (1914), 32 O.L.R. 352, 22 D.L.R. 478, *Tomlinson v. Hill* was considered and approved, and the reasoning in that case was considered as not confined to a mere claim for dower, but as applicable to every claim for any interest in the land sold for taxes.

In *Re Hunt and Bell* (1915), 34 O.L.R. 256, 24 D.L.R. 590, land was conveyed to a purchaser by deed which contained covenants by the purchaser to observe certain building restrictions. Subsequently the land was sold for taxes, and the question was, whether the conveyance for arrears of taxes extinguished the covenant. Garrow, J.A., in delivering the judgment of the Court, said (p. 263): "My opinion is, that the sale and conveyance for taxes had the effect of conveying to the purchaser the land free from any claim under the covenant;" and he quotes with approval *Tomlinson v. Hill*.

Applying the reasoning of these cases to the present one, I am of opinion that the taxes assessed against the strip of land in question became a charge upon that land and every interest in it, including any right of way to which the defendants may have been entitled; and that the sale and conveyance of the strip of land for taxes extinguished that right.

Having reached this conclusion, it is unnecessary for me to consider whether the defendants had acquired the right of way claimed.

For these reasons, I think the plaintiffs are entitled to the relief claimed.

*Judgment for the plaintiffs with costs.*

[An appeal by the defendants from the judgment of MULOCK, C.J.Ex., was dismissed by a Divisional Court on the 22nd October, 1918. The reasons for the decision of the appellate Court will be reported in due course.]

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[LATCHFORD, J.]

June 6.

## ROE V. TOWNSHIP OF WELLESLEY.

*Highway—Nonrepair—Road in Rural Municipality—Injury to Person in Motor-vehicle—Negligence—Duty of Municipality in Respect of Motor-vehicles—Rate of Speed—Carelessness of Driver—Knowledge of Bad Place in Road—Driver under Statutory Age—Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 13 (7 Geo. V. ch. 49, sec. 10)—Unlawful Use of Highway.*

In an action by a husband and wife to recover damages from a township corporation for injuries caused to the wife, by reason of a motor-vehicle in which she was being driven, along a road in the township, dropping into a hole at the edge of a bridge forming part of the roadway, it appeared that the vehicle was owned by the husband, and was, at the time of the occurrence, being driven by the plaintiffs' son, a boy under 16 years of age, and that the speed of the vehicle, as it descended a hill and passed off the bridge, was between 15 and 20 miles an hour. The son had driven the vehicle over the same place two days before, and he and the plaintiffs then felt a bump as they passed from the road to the bridge:—

*Held*, that the son's duty, having regard to the knowledge which he had of the condition of the road at the bridge, was to have driven with caution off the bridge; his carelessness was the cause of the injury to his mother; and, although the road was not in good repair for motor-vehicle traffic, at the speed the plaintiffs were travelling, there was no negligence on the part of the defendants, and the plaintiffs were not entitled to recover damages.

*Held*, also, that the plaintiffs were identified with their driver; his negligence was theirs; the father knew that his son, owing to his youth, was prohibited by the Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 13, as amended by 7 Geo. V. ch. 49, sec. 10, from driving a motor-vehicle; and yet it was by the father's authority, and with the concurrence and sanction of his co-plaintiff, that the boy was driving.

The use of the highway which the son was making, at the instance of the plaintiffs, was unlawful—they were unlawfully upon the defendants' highway.

Review of the authorities.

A rural municipality is not bound to maintain its roads in such repair that they shall be safe for motor-vehicles driven at the speed at which the plaintiffs were proceeding.

*Dictum* of MEREDITH, C.J.O., in *Davis v. Township of Usborne* (1916), 36 O.L.R. 148, 151, explained.

ACTION for damages for injury sustained by the plaintiff Margaret Roe by reason of an automobile in which she was being driven along a road in the township of Wellesley dropping into a hole at the edge of a bridge forming part of the roadway, and for the expense and loss which her husband and co-plaintiff incurred by reason of her injury.

The action was tried by LATCHFORD, J., without a jury, at Toronto.

A. E. Knox, for the plaintiffs.

Gideon Grant, for the defendants, the Municipal Corporation of the Township of Wellesley.

June 6. LATCHFORD, J.:—The plaintiff Margaret Roe was injured when the motor-car in which she and her co-plaintiff were being driven by their son, a boy under 16, passed at a rapid rate off a bridge on the road allowance between the 10th and 11th concessions of the township of Wellesley, an hour or two before noon on the 5th June, 1916. I find that Mrs. Roe had for many years being subject to violent headaches caused by an injury sustained when she was a young girl. The evidence on this point of Mrs. Whipp as to statements made by Mrs. Roe was uncontradicted, though Mrs. Roe had an opportunity of contradicting it when recalled to the witness-stand at the close of the defendants' case. I am unable to accept her evidence that the pain which she states she has suffered since the accident in the region back of the right ear, or the dizziness which she occasionally experienced, is attributable to the accident. The medical evidence on these points was far from convincing, and it was incumbent upon Mrs. Roe to shew that the headache and the other troubles of which she complains were caused by the accident. Her appearance is indicative of good health, and the mishap but slightly interfered with the conduct of her household affairs. For all the injuries actually sustained by her, \$500 would, in my opinion, be liberal compensation. Roe himself has proved an out-of-pocket loss of only \$2, but he probably had to pay a dentist's bill and for the attendance of Dr. Bateman and Dr. Stephenson. The total damage sustained by Roe would not exceed \$100.

But the plaintiffs are not, I think, entitled to recover any damages, although the road was not in good repair for automobile traffic at the speed at which the plaintiffs were travelling. I reject as incredible the evidence of the plaintiffs and their son that they were proceeding at the rate of 4 or 5 miles an hour. Had that been the speed of the car, the accident could not possibly have happened. Moreover, their evidence is contradicted by two witnesses—both disinterested—one of whom, as himself the driver of an automobile, was competent to judge speed, and gave his testimony in a manner that led me to regard it as true. I find that the speed of the plaintiffs' car, as it descended the hill and passed off the bridge, was at least between 15 and 20 miles an hour. The plaintiffs' driver knew of the "drop," as witnesses called it, at the bridge caused by a downward grade, and the excessive rains of

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spring and early summer. He had driven the car over it two days previously. A gradient of 1 in 10 or 12 led up to the bridge, and he was probably proceeding slowly. Yet he and the plaintiffs felt "a bump," as they call it, as they passed from the road to the bridge. Had the plaintiffs' son remembered this on the 5th—and he ought to have remembered it, not only because he felt the bump, but because ordinarily the level of rural bridges is higher than the road at either end—he would have passed off the bridge at much slower speed than he was proceeding with, and the accident would not have happened. His duty, having regard to the knowledge which he had of the condition of the road at the bridge, was to have driven with caution off the bridge. He drove carelessly, and his carelessness caused the accident to his mother.

On another ground also the plaintiffs fail. They are as a matter of law identified with their driver. The car was owned by the plaintiff James Roe, who knew that his son was prohibited by law, owing to his age, from driving a motor-vehicle. Yet it was by Roe's authority and with the concurrence and sanction of his co-plaintiff that the boy was driving the car. Even if the prohibition did not exist, the negligence of the driver affects his parents, as he was acting by their authority. His negligence is clearly their negligence.

The Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 13, as amended by 7 Geo. V. ch. 49, sec. 10, provides that no person under the age of 16 years shall drive a motor-vehicle.

As the plaintiffs' son was, at the date of the accident, prohibited by the statute from driving a motor-car, the use of the highway which he was making, at the instance of the plaintiffs, who were aware of his age, was, in my opinion, unlawful.

Every act is to be considered unlawful which the law has prohibited to be done: Abbott, C.J., in *Cannan v. Bryce* (1819), 3 B. & Ald. 179, at p. 184; and no suit can be maintained upon an unlawful act: *ib.*, p. 185. The plaintiffs were, in the circumstances, unlawfully upon the defendants' highway; and, while the defendants were not entitled unnecessarily and knowingly to increase the normal risk by deliberately placing unexpected dangers in the plaintiffs' way (*Grand Trunk R.W. Co. of Canada v. Barnett*, [1911] A.C. 361, at p. 369), in other words, not entitled to act wantonly or recklessly, the plaintiffs—even had the highway



been out of repair to a much greater extent than it was, and the defendants affected with notice of the fact—would still have no cause of action.

In *Greig v. City of Merritt* (1913), 24 W.L.R. 328, 11 D.L.R. 852, it was held that the owner of a motor-car not licensed and registered as required by a statute of the British Columbia Legislature had no right of action for injury occasioned to his car by a defect in the highway.

This case was followed in *Etter v. City of Saskatoon*, [1917] 3 W.W.R. 1110, 39 D.L.R. 1, a decision of a strong Court—Haultain, C.J., and Lamont and Brown, JJ.

In Massachusetts, in a long line of cases, it has been determined that the owner of an unlicensed and unregistered motor-car cannot maintain an action for negligence: Babbitt on Motor Vehicles, 2nd ed., para. 1087. The owner of such a car is in that State held to be an outlaw: *Koonovsky v. Quellette* (1917), 226 Mass. 474, citing *Dudley v. Northampton Street R.W. Co.* (1909), 202 Mass. 443, and *Holden v. McGillicuddy* (1913), 215 Mass. 563.

I desire to add that, in my opinion, no duty is cast upon a rural municipality like the Township of Wellesley to maintain its roads in such repair that they shall be safe for automobiles driven at the speed at which the plaintiffs were proceeding.

The opinion of the learned Chief Justice of Ontario in *Davis v. Township of Usborne* (1916), 36 O.L.R. 148, at p. 151, that the statutory duty of the municipality is to make the road reasonably "safe from any additional danger incident to the use of it by motor-vehicles," is to be considered with reference to the facts of that case. There the highway was too narrow and unguarded to permit the reasonable use of it at the same time by the plaintiff and an automobile in charge of another person.

In a Quebec case, *DeGuise v. Corporation de Notre-Dame-des-Laurentides* (1916), Q.R. 50 S.C. 31, Dorion, J., considered that a statute imposing a liability to make and maintain roads is to be construed with reference to the means of transport in use when the statute was passed.

To the same effect is *Fafard v. Cité de Québec* (1916), reported in the same volume at p. 226.

I wish to add that the condition of the road in Wellesley deposed to by certain witnesses as existing at the time of the accident did

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not arise until nearly a month later, and that I accept the evidence of McKay, Reide,<sup>e</sup> and Petch as to the depth of the drop or depression ascertained by actual measurement in preference to the estimate made by Mr. Roe.

The plaintiffs' case fails because negligence on the part of the defendants was not established, and because the accident could have been avoided by the exercise of reasonable care by the plaintiffs' son, who, moreover, was prohibited by the statute from acting as the driver of a motor-vehicle.

The action is therefore dismissed with costs.

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[APPELLATE DIVISION.]

DINGLE v. WORLD NEWSPAPER CO.

*Libel—Newspaper—Notice before Action—Libel and Slander Act, sec. 8 (1)—Notice not Addressed to Defendant—Dismissal of Action—Appeal—Divided Court.*

In an action for libel contained in a newspaper, the notice required by sec. 8 (1) of the Libel and Slander Act, R.S.O. 1914, ch. 71, must be given to the defendant: notice to the editor of the newspaper is not sufficient. So *held*, by MIDDLETON, J., who dismissed this action upon a summary application for judgment, following *Burwell v. London Free Press Printing Co.* (1895), 27 O.R. 6, and *Benner v. Mail Printing Co.* (1911), 24 O.L.R. 507. Upon appeal, a Divisional Court was divided in opinion, and the judgment of MIDDLETON, J., stood.

MOTION by the defendant company, upon admissions contained in the examination of the plaintiff for discovery, for a judgment dismissing the action.

May 6. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

*K. F. Mackenzie*, for the defendant company.

*D. J. Coffey*, for the plaintiff.

May 11. MIDDLETON, J.:—The action is brought to recover damages for a libel published in the defendant company's paper. It is admitted that the only notices served were addressed "To The Editor of the World."

The Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 8 (1), provides that "no action for libel contained in a newspaper shall lie unless the plaintiff has, within six weeks after the publication thereof has come to his notice or knowledge, given to the defendant notice in writing," etc.

It is contended that the notice relied on is not sufficient, as it is addressed to the editor, and not to the defendant.

The matter is concluded, in favour of this contention, by the decisions of Meredith, C.J.O. (then C.J.C.P.), in *Burwell v. London Free Press Printing Co.* (1895), 27 O.R. 6, and *Benner v. Mail Printing Co.* (1911), 24 O.L.R. 507.

According to these decisions, the statute means what it says, and requires a notice to the defendant, and it is not enough to give a notice to some one else, even if that person is an officer of the defendant.

The notice to the defendant may be served in the manner pointed out by the statute (sec. 8 (1)).

The action must be dismissed with costs.

The plaintiff appealed from the judgment of MIDDLETON, J.

June 10. The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

*D. J. Coffey*, for the appellant, argued that the notice given was in substantial compliance with the statute, and the technical objection to which effect had been given in the Court below should not be allowed to deprive the appellant of the right to vindicate his character. The cases followed by Middleton, J., were not binding upon this Court.

*K. F. Mackenzie*, for the defendant company, respondent, was not called upon.

At the conclusion of the argument for the appellant, judgment was delivered by the Court.

MEREDITH, C.J.O., said that the case was not distinguishable from the *Burwell* and *Benner* cases, which, in his opinion, were rightly decided. The appeal should be dismissed.

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MAGEE, J.A., was of opinion that there had been a substantial compliance with the Act, and that the appeal should be allowed.

HODGINS, J.A., agreed with MEREDITH, C.J.O.

FERGUSON, J.A., agreed with MAGEE, J.A.

*The Court being equally divided, appeal dismissed with costs.*

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June 11.

[APPELLATE DIVISION.]

BRUNELLE V. GRAND TRUNK R.W. CO.

*Railway—Injury to and Death of Person Crossing Track—Foot Caught in “Split-switch”—Negligence—Maintenance of Split-switch at Highway Crossing—Findings of Jury—Evidence—Inference as to Cause of Death—Statutory Authorisation of Switch—Approval by Board of Railway Commissioners—Failure to Shew—Railway Act, R.S.C. 1906, ch. 37, sec. 238 (8 & 9 Edw. VII. ch. 32, sec. 5)—Presumption—Function of Jury—Jurisdiction of Board—Rights of Railway Company in Respect of Highway—Negligent and Excessive Exercise of Powers—Establishment of Public Highway.*

At about 10 o'clock at night on a day in April, 1915, D. was found lying beside the tracks of the defendants at a place where the tracks were crossed by Q. street, in the town of P., “with practically both thighs amputated above the knee and one foot tightly caught in the frog or switch.” D. died shortly afterwards, and this action was brought by the administrator of his estate to recover damages for his death. The switch was of the kind known as a “split-switch.” At the trial, the jury, in answer to questions, found that the death was caused by the defendants' negligence, which, they said, consisted in having a split-switch on the public highway; and they found against contributory negligence:—

*Held*, upon the evidence, that the Dominion Board of Railway Commissioners had not approved of the placing of the split-switch at the crossing; and the defendants were not relieved or otherwise assisted by the provisions of sec. 238 of the Railway Act, enacted by 8 & 9 Edw. VII. ch. 32, sec. 5, merely because no complaint or application had been made to the Board under that section—it was not to be presumed that, because the Board had not been put in motion, approval of the switch had been given.

*Held*, also, upon the evidence, that Q. street was a public highway.

*Held*, also, that the inference could properly be drawn by the jury that the construction and maintenance of the switch on the highway was a source of danger to those having the right to pass over the street; that there was, therefore, evidence of negligence to go to the jury; and that the jury, in basing their conclusion on a consideration of that evidence, were not usurping the jurisdiction of the Board.

Not only must an authorised act be done in a reasonable way and without negligence, but there is the additional obligation upon one exercising a statutory or authorised power, not to exceed that power. Whatever were the rights which the defendants acquired in respect to the highway, they did not include the erection and maintenance thereon of the split-switch.

*Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works*, [1898] 2 Ch. 603, 611, *Roberts v. Charing Cross Euston and Hampstead R.W. Co.* (1903), 87 L.T.R. 732, 733, 734, and *Moore v. Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462, 465, referred to.

*Held*, also, that, although no one saw the accident happen, it could have happened only from an engine or train passing over D.'s body; and it was open to the jury to draw the conclusion they did.

*Held*, also, that the evidence sustained the jury's finding against contributory negligence.

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THE following statement of the facts is taken from the judgment of KELLY, J.:—

This appeal is by the defendants from the judgment of Mr. Justice Latchford, at the close of a trial with a jury, on a verdict for \$6,000 in favour of the plaintiff, who is the administrator of the estate of Telephore Desrochers.

On the night of the 6th April, 1915, at about 10 o'clock, Desrochers, who was a farmer, and whose residence was in the township of Tiny, in the county of Simcoe, 6 or 7 miles in a north-westerly direction from the town of Penetanguishene, was found to have met with an accident on the tracks of the defendant company, at their intersection with Queen street in that town, from which his death resulted a few hours afterwards. There is no evidence of any one who saw the accident happen. Dr. Spohn, who was then mayor of the town and local physician of the defendant company, says, speaking of the night of the occurrence: "I was telephoned from the Grand Trunk and told there was an accident on Queen street and to go there immediately;" that, on going there about 10.20 or 10.25 p.m., he found Desrochers "lying beside the tracks with practically both thighs amputated above the knee and one foot tightly caught in the frog or switch" of the defendants' tracks, and that he endeavoured unsuccessfully to disengage from the switch Desrochers' foot, which was so severed that it was merely hanging by the tendons. There were no bruises or injuries of any kind except to the legs.

The switch was one known and referred to in the evidence as a "split-switch." The allegations are that the defendants' tracks and the switch were negligently and dangerously constructed, and in consequence the deceased was unable to extricate his foot; that the defendants' servants in charge of their engine and train were negligent in the running of it, and that the defendants were negligent also in not providing proper protection for persons crossing their tracks at the place of the accident and in not giving proper warning of the approach of the train.

The jury, in answer to questions, found that the death was

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caused by the defendants' negligence, which, they said, consisted in having a split-switch on the public highway; and they found against contributory negligence.

The grounds of appeal are:—

1. That there was no evidence proper to be submitted to the jury of any negligence by the company.

2. That the plaintiff failed to connect the accident to the deceased with any negligent act of the defendants which caused the accident.

3. That, the defendants having constructed their railway under the provisions of the Railway Act and in accordance with the order of the Railway Board, there can be no liability for any injury.

4. That there had been no order by the Dominion Railway Board for the protection of this crossing, and the findings of the jury cannot render the defendant company liable; and that the action should be dismissed on the jury's findings:

5. That, the defendants not being responsible for the lighting of the crossing, the jury's finding in regard to contributory negligence is tantamount to a finding against the deceased:

6. That, as the finding of the jury amounts to a finding that the accident happened through the defendants maintaining a nuisance on the highway, the proper authorities are not before the Court, and the action against the company should fail.

January 31. The appeal was heard by MULOCK, C.J.Ex., MAGEE, J.A., CLUTE, SUTHERLAND, and KELLY, JJ.

*D. L. McCarthy*, K.C., for the appellants, argued that there was no evidence of any negligence by them proper to be submitted to the jury: *Mallory v. Winnipeg Joint Terminals* (1916), 53 S.C.R. 323, 29 D.L.R. 20; that the plaintiff had failed to connect the accident to the deceased with any negligent act of the appellants which had caused the accident; that, the appellants having constructed their railway under the provisions of the Railway Act, and in accordance with the order of the Railway Board, there could be no liability for any injury; and that, as there had been no order of the Railway Board for the protection of this crossing, the findings of the jury could not render the appellants liable: *Grand Trunk R.W. Co. v. Griffith* (1911), 45



S.C.R. 380. Counsel also argued that Queen street, at the point of the accident, was not a public highway. The Railway Board, by approving of the plan for the removal of the station, approved also of the location of the tracks and switches upon and adjoining Queen street. The jury, by their findings, were usurping the jurisdiction of the Railway Board. In any event, the appellants were relieved from liability by the provisions of sec. 238 of the Railway Act.

*H. J. Scott*, K.C., for the plaintiff, respondent, contended that the evidence shewed that Queen street, at the point where the accident occurred, was a highway; that the approval by the Railway Board of the plan for the removal of the station did not amount to approval as well of the tracks and switches upon and adjoining Queen street. Section 238 of the Railway Act did not relieve the appellants from responsibility. The question whether they were guilty of negligence in incumbering their tracks with this dangerous switch at a highway crossing was one for the jury, and the inference that they were so guilty could be properly drawn by the jury: *Gibson v. Chicago Great Western R.R. Co.* (1912), 28 Amer. & Eng. Ann. Cas. 1263; *Cooper v. Baltimore and Ohio R.R. Co.* (1908), 14 Amer. & Eng. Ann. Cas. 693. The jury were not usurping the functions of the Railway Board. They simply found that the switch was dangerous, and that the appellants were negligent in using it where they did.

*McCarthy*, in reply.

June 11. The judgment of the Court was read by KELLY, J. (after setting out the facts as above):—Queen street, which the tracks intersect, runs in a north-westerly direction, ending at the water's edge of Penetanguishene Bay, a short distance from the tracks. Running in a north-easterly direction across Queen street, the tracks lead to their terminus at or near the present station. The location of the station, as will be explained later on, was moved in 1913 from a place much nearer to Queen street than it occupied at the time of the accident, and now occupies.

On the argument the question was raised, whether Queen street at that point or the railway right of way was first established; or, in other words, whether the right of way was carried over Queen street, or a street then existing, or whether Queen

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street was laid out across the right of way already existing. This suggested the further question whether Queen street is a public highway.

At the trial the plaintiff put in a plan (exhibit 3) of Queen street, verified by the evidence of Mr. Lumsden, the surveyor who prepared it, and who swore to the measurements thereon which he had personally made. This shews Queen street, at its intersection with the railway tracks, to have a width of 98 or 100 feet.

A blue print copy (exhibit 8) of a plan, apparently prepared in 1914 for the purpose of obtaining the approval of the Board of Railway Commissioners of the change of the location of the defendants' station, was put in by the defendants; this shews Queen street to have at that point a width of about 65 or 66 feet; but, as will be pointed out later on, that is inaccurate. Exhibit 3 shows the switch where Desrochers was injured to be wholly upon the land comprised within the boundaries of Queen street, and several feet distant from its easterly limit. As shewn on exhibit 8, the switch is not within the limits of Queen street, but to the east of its easterly limit. It is of some significance that exhibit 3 was prepared with special reference to the conditions prevailing at Queen street and adjacent to it at the time of the accident, while the particular purpose of the plan of which exhibit 8 purports to be a copy was to designate the new location of the defendants' station many hundreds of feet north-easterly from Queen street.

During the argument it was urged that the approval by the Board of Railway Commissioners of the plan for the removal of the station was an approval as well of the location of the tracks, switches, etc., upon and adjoining Queen street. A knowledge of the form of and the material used upon the application to the Railway Board, therefore, became of importance; and, on the suggestion of the Court, counsel for the defendants undertook to procure and submit such of that material as was obtainable. It has now been submitted, as well as copies of other and earlier plans, all of which are of importance, inasmuch as the findings of the jury are apparently on the assumption that Queen street, at the place of the accident, is a public highway, and that the accident happened on that highway. The history of the street, as shewn by the evidence and the material recently submitted, is, that as early as 1846, the "town-plot" of Penetanguishene was laid out.

Amongst this material is what purports to be a copy (taken recently from the registry office at Barrie, the county-town of the county of Simcoe, in which Penetanguishene is situated) of a plan from the Crown Lands Department bearing date, December, 1846. The town-plot is there referred to as "town-reserve." That plan shews many of the streets found upon the later plans, including Queen street (though it is unnamed on that plan), and their present location with reference to other established boundaries and points. Thus the location of one of the streets on the town-plot is readily identified with the present Queen street.

On the 29th January, 1875, by-law No. 248 of the County of Simcoe was passed, erecting and constituting the Village of Penetanguishene into an incorporated village, and defining its limits as being "the town-plot of the unincorporated village of Penetanguishene, in the townships of Tiny and Tay, as laid out under the direction and by the Crown Lands Department, and as now recorded in the Crown Lands Department of Ontario," evidently referring to the plan of December, 1846, already mentioned.

In 1882 (by 45 Vict. ch. 40) Penetanguishene was incorporated as a town, the Act of incorporation declaring that the town should comprise and consist of "the present village of Penetanguishene," and of other lands therein described.

The North Simcoe Railway Company was incorporated in 1874 (Ontario Act 37 Vict. ch. 54). It appears from the statement of the defendants' counsel that construction work was commenced soon afterwards; that the road was leased to the Northern Railway Company in 1888; and that it was subsequently taken over by the defendant company.

There has also been submitted by the defendants' counsel what purports to be a copy of a surveyor's plan made on the 15th September, 1875, of the right of way of the North Simcoe Railway through the village of Penetanguishene, the plan being signed by the superintendent and the chief engineer of the railway company. This definitely shews Queen street running to the water's edge and intersecting the company's right of way. The indications are all in the direction that Queen street was laid out, existed upon the ground, and was acknowledged as a street or public highway long before the location and construction of the railway. There is no

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evidence to the contrary, nor evidence that the defendants own or have title to that part of the right of way which falls within the limits of Queen street, other than a right to use it as a part of their railway line.

The plan of December, 1846, shews a street on the present location of Queen street with a width of approximately 100 feet; the railway company's plan of the 15th September, 1875, shews Queen street in its present location, with a similar width at the place of its intersection with the company's right of way.

The plan submitted in 1914 to the Board of Railway Commissioners, when approval of the removal of the station was sought, also recognises Queen street, but gives its width, by scale, at approximately 65 or 66 feet. If the measurements on the earlier plans and those on plan exhibit 3 are correct—and I think they must be so accepted—then the width of Queen street as given on the plan of 1914 is misleading.

That circumstance tends to emphasise that what was submitted for the consideration of the Railway Board in 1914 was simply and solely the new location of the station, and that the application had no reference to the width of Queen street or the location of the tracks or switches upon or crossing it.

What happened in connection with the application for removal of the station (I speak from the copy of the material now submitted, including the record of the Railway Board's action thereon) was, that the defendants in 1913 moved the station from its former location, which was about 1,100 feet north-easterly, measured along the defendants' tracks, from the north-easterly side of Queen street to its present location, about 600 feet still further from Queen street. I take the measurements and distances from scaling on the copy of the plan submitted to the Board. This action on the defendants' part followed upon a resolution of the Municipal Council of the Town of Penetanguishene, passed on the 31st March, 1913, that the defendant company be given permission to move the station to the proposed new site, etc. The company had overlooked getting the Board's approval until after the removal had taken place, and so in May, 1914, an application was made for an order "under section 258 of the Railway Act, approving of the new location of the company's station at Penetanguishene, as shewn on the plan" which accom-

panied the application. A copy of the resolution also accompanied the application.

The order of the Board of the 16th May, 1914, styled in the matter of the application of the company "for approval of the location of the station at Penetanguishene," etc., was, "that the location of the applicant company's station at Penetanguishene, in the Province of Ontario, as shewn upon the plan on file with the Board . . . be and it is hereby approved."

It is manifest, therefore, that what was before the Board was solely the removal of the station, and that the application had no reference to the location or disposal of the tracks or switches at Queen street. To be convinced that the Board did not have these under consideration, one has but to look at the material on which the application was made, and the order granted. Had that material been prepared with the object of expressly, or as an incident to the removal of the station, dealing with the conditions at Queen street, it is, I think, safe to say that, in view of what is shewn by the earlier plans and by the Lumsden plan (exhibit 3), it would have come to the attention of those who prepared the plan of 1914 that the width of Queen street is much greater than it appears on that plan.

Assuming that the order of the Board operated as an approval of the location of the tracks and switches as they appeared on the plan before the Board, then there was no approval of the switch on the highway; for that plan, as already pointed out, places the switch not on the highway as it is shewn on that plan, but on lands not comprised in or forming part of Queen street. If there was an approval at all, it was an approval of a switch, not on Queen street, but outside of it. Had the plan given Queen street at its actual width of 100 feet or thereabouts, it might have been open to argument, other adverse circumstances not intervening, that the Board had given approval to the switch being maintained in the location it occupied at the time of the accident; but whatever weight might have been given to that argument under such circumstances, completely fails when it is kept in mind that the switch as shewn upon that plan is not upon the street.

Approval of its existence on the street was not obtained. There is no positive evidence as to when it was first placed upon the street; but, assuming that it was there prior to the coming

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into force of the present sec. 238\* of the Railway Act (enacted by 8 & 9 Edw. VII. ch. 32, sec. 5, which also repealed sec. 238 of R.S.C. 1906, ch. 37), or of the section for which it was substituted, the defendants are not relieved from liability or otherwise assisted—as has been suggested—by the provisions of that section, merely because no complaint or application has been made to the Railway Board under that section, or because the Board had not on such complaint or application, or of its own motion, made the order contemplated by that section. It should not be held that, because the Board has not been put in motion, approval of the switch upon the highway must be presumed to have been given.

There is also to be further considered the question whether Queen street is a public highway. It is unnecessary to say that no conclusion here arrived at can bind the municipality, which is not a party to the action; but, from the evidence of user of the street by the public, the presumption is not unreasonable that it was regarded as a public way, and that such user amounted to an acceptance of it as a highway, if indeed it were necessary that there should be an acceptance, in view of the street appearing on the Crown Lands Department plan of 1846, followed by recognition of it on the occasion of the incorporation of the village, and later in the incorporation of the town. There is the uncontradicted evidence of several witnesses that Queen street has been used as a public highway leading to the water's edge for purposes which they mention, and particularly that in winter and spring it was used by residents on the opposite side of the bay, who made use of that means of reaching the town, travelling over the bay upon the ice, and landing at the foot of and travelling over Queen street, thus materially reducing the distance from their places of residence to the town as compared with following the longer and more circuitous way around the bay. Residents of the town also used it as a means of reaching the bay and for other purposes,

\*238. Where a railway is already constructed upon, along or across any highway, the Board may, upon its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan or profile of such portion of the railway, and may cause inspection of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient

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and, so far as it appears, that was the recognised and unquestioned condition of things at and long prior to the accident. Desrocher's farm was "across the bay" from the town.

There is the further uncontradicted evidence that in April, 1915, there was ice on the bay, and persons were travelling upon it.

The defendants and their predecessors undoubtedly believed that Queen street was public, when, in 1875, they prepared their plan of their proposed right of way, as well as in 1914, when they made application to the Railway Board in respect of the removal of the station; these were both affirmative acts in relation to this street. That they so regarded it, and that they expected it to be used and travelled upon as a public street, is further indicated by their erecting and maintaining upon it at this crossing, as shewn by exhibits 4, 5, and 6 (photographic views), a sign-board having thereon the words "Railway Crossing"—evidently in compliance with sec. 243 of the Railway Act, which requires that at every highway crossed at rail-level by any railway, such a sign shall be erected and maintained,

With the knowledge they are thus shewn to have had that the street was deemed to be and was used as a public highway, the crossing over which should be protected as a highway crossing in the interest of those having the right to pass over it, they erected and maintained thereon the split-switch in which Desrochers was caught on the night of the 6th April, 1915, with fatal consequences to him.

Assuming then that for present purposes Queen street must be regarded as a public highway, and it being established that the switch is upon it, and that approval of the Board of Railway Commissioners had not been given in respect of it, could the inference properly be drawn that its construction and maintenance on the highway were a source of danger to those having the right to pass over the street, and was there thus negligence on the part of those who so constructed and maintained it? The jury so regarded it; that is the effect of their finding. It was described by witnesses called by the defence as a standard split-switch in use on different railways. The inference can readily be drawn from the evidence that it is in fairly general use; that does not necessarily imply that it is such a structure as may be placed or used upon a highway without danger to the public, even though from an operating standpoint it works satisfactorily.

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Two disinterested witnesses—civil engineers who also had much experience in railway construction—spoke of the character of the switch. Their evidence was not contradicted. One of them said that placing a switch such as the one in question on a public highway is objectionable as constituting a danger to the travelling public; that he never knew it done where it could be avoided; and that in this instance he saw no reason why it could not have been placed 20 or 30 feet further to the east, thus removing it beyond the highway

The other witness, Mr. Czowski, characterised the placing of a split-switch on a road allowance as dangerous practice, "endangering pedestrians as well as animals crossing on a highway." Then followed these further answers of his:—

"Q. In what way now is a split-switch dangerous; just explain to the jury? A. The portion of the point from necessity on one side or the other is always open. There is no possibility of blocking or packing it. The result is that you have an open portion.

"Q. What do you mean by blocking or packing? A. Either wood or metal fillers that are put in at the various parts of the switch that are not movable, to prevent a man's foot from getting caught underneath and between the balls of the rail, where the two rails come together, at any part of a frog or a switch and in a switch, and particularly a split-switch, there is this portion at one side that is always open, and on account of having to move it from side to side and close it, when you want to change the switch, it is impossible to pack it, and therefore you have this open portion that is liable to entangle a man's foot, or cattle or any animals that may be crossing. That is why I say it is dangerous practice. It is recognised as dangerous practice wherever it is, and it is particularly, of course, dangerous on a highway, because the public have a right to cross the highway; and therefore the railway companies, as a rule, make it a practice not to put that, what is really a man-trap, where the public are entitled to go. It is bad enough in a yard and on sidings where their own employees have to traverse a switch, and it is very bad practice to put it where the public are entitled to travel."

And on cross-examination:—

"Q. And it depends very much on the character of the crossing doesn't it? Have you seen this crossing? A. No, I haven't seen

it. I don't think it depends on the character of a crossing. I have yet to see a crossing that one could not be avoided.

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"Q. Have you observed split-switches in close proximity to the planking on either side? A. Yes, a very bad practice.

"Q. But it is done? A. I didn't say it wasn't done; I said that it was very bad practice.

"Q. That is your opinion? A. Yes.

"Q. But it is universally practised? A. I do not think it is universally practised.

"Q. Why not? A. You are reciting a few exceptional cases where they have used bad practice."

Under all the circumstances, I am of opinion that there was evidence to go to the jury on the question of the defendants' negligence; and, in basing their conclusion on a consideration of that evidence, the jury were not, as was contended by the defendants' counsel, usurping the jurisdiction of the Railway Board. The finding was not in the nature of a direction as to what the protection to the public should be, but a finding that, from the kind and manner of construction of the switch, it was dangerous to persons using the highway, and that those responsible for its presence on the highway were negligent if it was the cause of injury.

The principle has often been stated in respect to the obligation of persons exercising rights conferred by statutory authority that the grantee of such powers is not in general responsible for injury resulting from that which the Legislature has authorised, provided it is done in the manner authorised and without negligence; but that an obligation rests upon persons exercising such powers not only to exercise them with reasonable care, but in such manner as to avoid unnecessary harm to others.

In his reasons for judgment in *Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works*, [1898] 2 Ch. 603, Collins, L.J., at p. 611, asserts the proposition, which he says is so frequently affirmed, "that, where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers."



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In *Roberts v. Charing Cross Euston and Hampstead R.W. Co.* (1903), 87 L.T.R. 732, Farwell, J., at p. 734, says: "If the Legislature has given powers and those powers are being used for the purpose of carrying out the work authorised and it is admitted that the mode in which they are being used is unreasonable, that is an abuse of the power so given and is therefore *ultra vires*." And at p. 733: "A company acting under statutory powers is treated as a private individual acting within his own rights. If a private individual acting within his own rights acts negligently, he is liable; although the act is perfectly lawful, if he does it negligently he is liable, and so it is with a company having these powers."

Lord Esher, M.R., in *Moore v. Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462, at p. 465, says: "If something is put without authority in the highway, that of itself does not make the person putting it there liable at the hands of an individual; an obstruction in the highway will not entitle an individual to bring an action. But if something is put in a highway without authority and is left there, so that it becomes that which is generally called a nuisance, but which is really an obstruction, and if a person, lawfully using the highway, falls over it, or is otherwise injured by it, the person putting it in the highway must make compensation."

Not only must an authorised act be done in a reasonable way and without negligence, but there is the additional obligation upon one exercising a statutory or authorised power, not to exceed that power. Whatever were the rights which the defendants acquired in respect of this highway, they did not extend to or include the erection and maintenance thereon of the switch in question, and their liability must be determined with that in mind.

The objection cannot prevail that, in the absence of evidence of any one who saw the accident happen, negligence of the defendants should not have been found. The injury to Desrochers which resulted in his death could have happened only from the engine or train passing over him. The conditions sworn to by Dr. Spohn as to what he observed on reaching the place of the accident speak for themselves. They left little doubt about what occurred: in any event it was open to the jury to draw the conclusion they did.

There was no evidence that Desrochers was negligent. From the evidence it does not appear that he was a man of reckless inclination or disposed to be negligent.

On the afternoon of the day of the accident he had been seen in the town, having returned from a business trip to Toronto, and it may be that when he met with the accident he was on his way homewards following the course that others, and perhaps he as well at other times, had followed. The night was dark, and even with the greatest of care he might not have been able to see the danger. He was within his rights when travelling upon the street, and the inference of want of care did not necessarily follow from the evidence.

The judgment appealed from should, in my opinion, be affirmed and the appeal dismissed with costs.

*Appeal dismissed.*

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BOSTON LAW BOOK CO. v. CANADA LAW BOOK CO. LIMITED.

*Appeal—Order of Judge in Chambers—“Finally Dispose of the whole or any Part of the Action”—Necessity for Leave to Appeal—Rule 507 (2).*

An appeal by the plaintiffs from the order of MIDDLETON, J., *ante* 13, setting aside an order of the Master in Chambers, whereby two British companies were added as defendants in this action and permission was given to serve process upon them out of the jurisdiction, was dismissed, upon the ground that the order appealed from did not “finally dispose of the whole or any part of the action,” and leave to appeal had not been obtained: Rule 507 (2).

AN appeal by the plaintiffs from the order and decision of MIDDLETON, J., in Chambers, *ante* 13.

June 12. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

*Alfred Bicknell*, for the appellants. The Boston Law Book Company sued the Canada Law Book Company Limited for \$1,492.23, the price of several sets of two volumes of an English series of reports. The Canada Law Book Company counter-claimed for \$20,000 damages for failure to deliver the whole series within due time, in accordance with a prospectus of W. Green & Son

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Limited, Edinburgh, who were producing the series. The Boston Law Book Company asserted that the whole fault for this failure, if any, lay in W. Green & Son Limited or in an English publishing company, Stevens & Sons Limited, and claimed relief over against those two companies, having them added as defendants. The failure to complete the series is the whole cause of the counter-claim and of the plaintiffs' claim against the added defendants. It all arose out of the default of the added defendants, and they were properly joined in the same action, in order to have all the claims arising out of the matter before the Court at the same time: *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co. Limited*, [1910] 2 K.B. 354; *Oesterrichische Export A. G. v. British Indemnity Insurance Co. Limited*, [1914] 2 K.B. 747; *Rein v. Stein*, [1892] 1 Q.B. 753; *Imperial Bank v. London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195. Secondly, if the action between the Boston Law Book Company and the Canada Law Book Company be decided separately from the action, if any, by the Boston Law Book Company against W. Green & Son Limited, the actions will have to be brought in different Courts—the latter in Scotland. The Boston Law Book Company may be unable to secure relief against W. Green & Son Limited in Scotland, while they may be held liable for that very default in Ontario. Thirdly, the whole matter in dispute is the interpretation of a prospectus issued by the Edinburgh publishers. This should be interpreted in one Court, on the same evidence, in presence of all parties.

*R. H. Parmenter*, for W. Green & Son Limited and Stevens & Sons Limited, and *R. T. Harding*, for the original defendants, respondents, were not called upon.

At the conclusion of the argument for the appellants, the judgment of the Court was delivered by MULOCK, C.J. Ex.:—This is an action to recover from the defendant company the contract price of certain law books which the plaintiff company had agreed to sell and deliver. The books were published by Stevens & Sons Limited and W. Green & Son Limited, publishers carrying on business in London and Edinburgh, who had given an option to the plaintiff company, carrying on business in Boston, in the State of Massachusetts, entitling the latter to whatever quantity



of the books might be required for the Canada and United States market. Thereupon the plaintiff company entered into the contract mentioned with the defendant company. In performance of the contract, the plaintiffs proposed to deliver to the defendants books which the defendants contended were not in accordance with the terms of the contract; and this was one of the defences raised.

The plaintiffs obtained from the Master in Chambers an order adding the Green and Stevens companies as defendants, but Mr. Justice Middleton set aside the Master's order, and the appeal is from Mr. Justice Middleton's order.

Rule 507 (2) provides as follows:—

“Except in cases in which a right of appeal is specially conferred no appeal shall lie from any judgment or order of a Judge in Chambers which does not finally dispose of the whole or part of the action or matter, unless by leave of a Judge other than the Judge by whom the judgment or order was pronounced.”

The order complained of does not finally dispose of the whole or any part of the action, and no leave to appeal therefrom was obtained; therefore, the order is not appealable; and the appeal is dismissed with costs.

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[APPELLATE DIVISION.]

April 11.  
June 14.

## FORSYTH V. WALPOLE FARMERS MUTUAL FIRE ASSURANCE CO.

*Insurance (Fire)—Contents of Barn—Hay Stacked outside not Included—Limitation of Liability—Provision in Application—Whether Forming Part of Contract—Insurance Act, R.S.O. 1914, ch. 183, secs. 156 (1), (3), 193 (1)—Statutory Condition 8—Mutual Insurance Company—Membership in, of Assured—By-law—Value of Property Destroyed—"Estimated Value"—Percentage of, only Insured—Absence of Proof of Excess.*

The defendants issued a policy insuring the plaintiff to the extent of \$1,600 against loss by fire in respect of the ordinary contents of a barn. During the currency of the policy, the barn was burned, with its contents, which were admittedly of the cash value of \$850. The defendants contended that their liability was limited to two-thirds of the value of the property destroyed, by reason of a term in the application for the insurance, signed by the plaintiff, that "not more than two-thirds of the cash value of any building or personal property will be insured by this company." The policy referred to the application as forming part of the policy. By the policy itself, the insurance was against loss or damage by fire to the amount of \$1,600, "such loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen." No statement of the cash value appeared in the application. On the back of the policy was printed statutory condition 8, which provides: "After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application."—

*Held*, by the majority of the Court, that the plaintiff, having applied for \$1,600 insurance on the contents of his barn, and having by his application indicated his agreement with the statement that the defendants would not insure more than two-thirds of the value or estimated value, was entitled to rely upon condition 8 and to treat the contract as based upon the fact that the amount of insurance applied for and granted was within the two-thirds limit; and it was not necessary to consider whether the application was really made part of the contract.

*Per* FERGUSON, J.A., that, having regard to the provisions of sec. 156 (1) and (3) and sec. 193 (1) of the Ontario Insurance Act, R.S.O. 1914, ch. 183, the application was not to be considered; the rights of the parties were to be determined by the language of the policy alone.

A by-law of the insurance company (defendants) restricted the company from insuring more than two-thirds of the estimated value. The plaintiff, as a policy-holder, was a member of the company; and it was argued that he could not claim more than two-thirds of the loss:—

*Held, per Curiam*, that, as there was no proof that \$1,600 exceeded two-thirds of the estimated value, the defendants were not aided.

Judgment of LATCHFORD, J., in favour of the plaintiff for the recovery of the full sum of \$850, affirmed.

*Per* LATCHFORD, J.:—Hay stacked outside the barn could not be considered to be included in the "contents" insured.

## ACTION upon a fire insurance policy.

The action was tried by LATCHFORD, J., without a jury, at Cayuga.

*R. S. Colter*, for the plaintiff.

*T. J. Agar*, for the defendants.

April 11. LATCHFORD, J.:—Action upon a policy of insurance issued by the defendants to the plaintiff on the 26th August, 1916, insuring him against loss by fire on the “ordinary contents” of a barn to the extent of \$1,600 and on certain live stock to the extent of \$600.

On the 11th December, 1916, during the currency of the policy, the barn was burned. Its contents were then, it is admitted, of the actual cash value of \$850.

At the trial the plaintiff contended that the defendants were liable to him for the damages which he sustained by reason of the burning of certain stacks of hay, about 100 tons in all, not in the barn, but piled near it. His contention was based on what he understood the defendants’ agent to have represented, that hay stacked as this was, within 80 feet of the barn, was to be regarded as covered by the policy.

I rejected this part of the plaintiff’s claim. Hay stacked outside the barn could not, in my opinion, be considered to be included in the word “contents.”

The defendants do not deny liability, but they say it is limited to two-thirds of the value of the property destroyed. They base this limitation on a term in the application printed on the form signed by the plaintiff on the 10th July, 1916, which is in the following words:—

“Not more than two-thirds of the cash value of any building or personal property will be insured by this company in connection with any other company or otherwise.”

The policy refers to the application as forming and making part of the policy.

By sec. 156(3) of the Insurance Act, R.S.O. 1914, ch. 183, the “application of the assured shall not as against him be deemed a part of or be considered with the contract of insurance except in so far as the Court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract.”

It is not pleaded or proved that the application contained any misrepresentation whatsoever.

The case therefore falls to be considered upon the terms of the contract expressed by the policy.

No proof was given that \$1,600 was more than two-thirds of

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the value of the contents of the barn at the time the insurance was effected.

The defendants had the right, under the application, to limit their liability to two-thirds of the amount of the loss.

The insurance was against loss or damage by fire, "such loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen, and shall not exceed the said amount insured, nor the value of the interest of the assured in the said property."

The contract, instead of placing a two-thirds limitation on its liability for loss, expressly fixes that liability at the "actual cash value of the property destroyed," and that value, it is conceded, is \$850.

Although not pleaded, it appears that, by signing a premium note, when applying for the insurance, the plaintiff became, under sec. 123 of the Act, a member of the defendants as a mutual insurance company. No by-law of the company was proved before me. An extract from a by-law of the company, not verified in any way, and not admitted as authentic by the plaintiff or his counsel, has recently been sent to me. It states, like the application, that "not more than two-thirds of the value of any building or other property will be insured by the company." As I have observed, there is no evidence that more than such value was insured in this case. Then again the defendants are confusing the value of the property insured with the loss which they agreed to pay.

The actual cash value of the contents of the barn destroyed by fire is conceded to be \$850. There will be judgment for the plaintiff for that amount, with costs on the High Court scale, without set-off.

The defendants appealed from the judgment of LATCHFORD, J.

May 15. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*T. J. Agar*, for the appellants. Although the amount of money involved is small, there is an important principle at stake, which the appellants think should be decided by the Court. The appellants maintain that, in view of the wording of the application,

which, as therein stated, "forms and is made part of" the policy, the liability of the company should be limited to two-thirds of the cash value of the property insured. The application and the policy must be read together; and, so reading them, the Court is entitled to consider the cases under the Insurance Act, R.S.O. 1897, ch. 203, sec. 144. He referred to *Williamson v. Gore District Mutual Fire Insurance Co.* (1866), 26 U.C.R. 145; *Elgin Loan and Savings Co. v. London Guarantee and Accident Co.* (1904-06), 8 O.L.R. 117, 9 O.L.R. 569, 11 O.L.R. 330. [HODGINS, J.A., referred to *Youlden v. London Guarantee and Accident Co.* (1913), 28 O.L.R. 161, 12 D.L.R. 433; *Sharkey v. Yorkshire Insurance Co.* (1916), 54 S.C.R. 92, 32 D.L.R. 711.] The plaintiff, moreover, is bound by the by-laws of the respondent company, of which he is a member, which provide that the company shall be restricted from insuring more than two-thirds of the "estimated value" of the property insured.

*R. S. Colter*, for the plaintiff, the respondent, argued that the trouble arose from the use by the defendants of the form of policy in vogue before the change in the Act. The whole contract is contained in the policy, and, as provided by R.S.O. 1914, ch. 183, sec. 156(3), the application is not to be deemed a part of the policy except where the Court determines that it contains some material misrepresentation by which the insurer was induced to enter into the contract. Nothing of the sort is shewn in this case.

*Agar*, in reply, referred again to the *Williamson* case, *supra*, as still an authority upon the interpretation of the statute.

June 14. HODGINS, J.A.:—I do not think that, upon the wording of the insurance contract herein, the question chiefly argued really arises. That question was, whether the provision in the application limiting the insurance to two-thirds of the cash value controlled the operative words of the policy, because in the latter were contained the words, "the said application forms and is made part of this policy." It is not necessary to consider whether the whole of the application is, notwithstanding the provisions of the Ontario Insurance Act, by that reference incorporated as part and parcel of the policy. If that point had to be expressly decided, it would be proper to deal again with the difficulties caused by the Supreme Court decisions which are referred to and discussed by

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this Court in the cases of *Youlden v. London Guarantee and Accident Co.*, 28 O.L.R. 161, 12 D.L.R. 433, and *Town of Arnprior v. United States Fidelity and Guaranty Co.* (1914), 30 O.L.R. 618, 12 D.L.R. 630, 20 D.L.R. 929. These difficulties are not cleared up by *Sharkey v. Yorkshire Insurance Co.*, 54 S.C.R. 92, 32 D.L.R. 711, though that case is a step in the right direction, as is recognised, though not with much effusion, in *Beury v. Canada National Fire Insurance Co.* (1917), 39 O.L.R. 343, 37 D.L.R. 105. But, if the application is looked at, there is really no inconsistency. In it the respondent applies for insurance, to the extent of \$1,600, upon the ordinary contents of his barn. Very few of the questions asked are answered, and little information is given. No statement of the cash value appears in the application. Hence, when reading the clause relied on in the application, namely, "Not more than two-thirds of the cash value of any building or personal property will be insured by this company in connection with any other company or otherwise," there is nothing to convey the impression that the request for \$1,600 is beyond the amount for which an insurance could or would be granted, or that, when the policy is issued, the amount insured will not be within the prescribed limit.

The policy insures against loss or damage to the extent of \$1,600, to be estimated "according to" (not "as") "the true and actual cash value of the said property at the time the same shall happen," and on its back is printed the following statutory condition:—

"8. After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application."

I think that the assured, having applied for \$1,600 insurance on the contents of his barn, and having by his application would indicated his acceptance of the condition that the company would not insure more than two-thirds of the value—the by-law says "estimated value"—is entitled to rely on this condition and to treat the company's contract as based upon the fact that the amount of insurance which he applied for and which was granted was within the two-thirds limit. There is in fact nothing in the application to controvert or weaken this position; and so the case may be decided upon the terms of the policy, without necessitating



the consideration of whether the application is really made part of the agreement.

It was argued that, as the respondent was a policy-holder, and therefore a member of the appellant body, he, at all events, could not claim more than two-thirds of the loss.

The by-law, as I have pointed out, restricts the company from insuring more than two-thirds of the "estimated value," and there is no proof that \$1,600 exceeded that estimated value. By-law 14 requires all applications for insurance to be passed upon and approved or rejected by a majority of the directors present at any meeting; and this, no doubt, was done before the policy was issued.

The appellants having failed to prove that they insured for more than two-thirds of the cash value or estimated value, and having agreed by their policy to pay the loss according to the true and actual cash value of the property at the time the loss happens, I think the appeal must be dismissed.

MACLAREN and MAGEE, JJ.A., agreed with HODGINS, J.A.

FERGUSON, J.A.:—The appellants cannot succeed unless we sustain their contention that the Court should read the application into or along with the policy of insurance, for the purpose of defining and thereby limiting the obligation assumed by the appellants under the wording of the policy.

It is stated on the face of the policy that the "said application forms and is made part of this policy."

The paragraph of the policy setting out the obligation of the company, is in the following words:—

"Now this policy witnesseth that the Walpole Farmers Mutual Fire Assurance Company, for and in consideration of the premises, insure the said property against loss or damage by fire or lightning to the amount aforesaid, such loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen, and shall not exceed the said amount insured, nor the value of the interest of the assured in the said property."

The application is not attached to the policy, but the appellants seek to read into the policy the following words taken from the

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application: "Not more than two-thirds of the cash value of any building or personal property will be insured by this company in connection with any other company or otherwise."

The appellants contend that, these provisions being read together, the company's liability is limited to two-thirds of the plaintiff's actual loss. The trial Judge directed judgment to be entered for the full amount of the actual loss. The respondent, while disputing the correctness of the appellants' contention as to the true interpretation of these documents, takes the position that, by the provisions of sub-secs. 1 and 3 of sec. 156, and sub-sec. 1 of sec. 193, of the Ontario Insurance Act, R.S.O. 1914, ch. 183, this Court is prohibited from looking at or considering the application. The sections relied upon read as follows:—

"156.—(1) Subject to the provisions of section 193 all the terms and conditions of the contract of insurance shall be set out in full on the face or back of the policy or by writing securely attached to it when issued, and unless so set out no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect shall be valid or admissible in evidence to the prejudice of the assured or beneficiary."

"(3) The proposal or application of the assured shall not as against him be deemed a part of or be considered with the contract of insurance except in so far as the Court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract."

"193.—(1) On the face of a policy of fire insurance there shall appear the name of the insurer, the name of the assured, the name of the person or persons to whom the insurance money is payable, the premium or other consideration for the insurance, the subject-matter of the insurance, the maximum amount or amounts which the insurer contracts to pay, the event on the happening of which payment is to be made, and the term of the insurance."

The provisions of these sections seem to me to be plain and positive. As stated by Anglin, J., in *Sharkey v. Yorkshire Insurance Co.*, 54 S.C.R. at p. 100, the directions of sub-sec. 1 of sec. 156, and of sub-sec. 1 of sec. 193, are explicit, and the prohibitions of sub-sec. 3 of sec. 156 express.

For these reasons, I am of the opinion that we cannot, in this case, consider the application, but must determine the rights of

the company by the language of the policy itself, unaided by anything in the application.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

[APPELLATE DIVISION.]

WANNAMAKER V. LIVINGSTON.

*Will—Validity—Evidence—Proof of Due Execution and Testamentary Capacity—Failure to Shew that Document Propounded was Expression of True Will of Testatrix—Duty of Solicitor Preparing Will on Instructions of Persons Benefited—Undue Influence of Near Relations—Finding of Trial Judge—Action to Set aside Gifts of Property Made by Testatrix in Lifetime—Relations in Position to Exercise Influence—Presumption—Onus—Parties—Amendment—Addition of Personal Representative.*

The plaintiff, a sister of E. S., an elderly spinster, who died in April, 1916, brought this action against J. L., another sister, and against the children of J. L., to set aside, on the grounds of want of consideration, the mental incapacity of E. S., and the undue influence of the defendants, a voluntary conveyance of land made to the defendant D. B. L. in 1911, and two gifts of money made respectively to the defendants M. L. and J. L. in 1915. The defendants, in their statement of defence, upheld the conveyance and gifts, and also set up as the last will and testament of E. S. a testamentary writing executed by her in July, 1913, whereby she devised all her real estate to the defendant D. B. L. and bequeathed her personal property to the defendants. The plaintiff, in reply, attacked the will, upon the same or similar grounds. The will had not been proved. Pending the action the plaintiff was appointed administratrix of the estate of E. S. and added as a party in that capacity:—

*Held*, upon the evidence as to the relative positions of the deceased and the three defendants, and considering the mental and physical conditions and surroundings of the deceased, that the defendants had it in their power to exercise a great influence over the deceased, and that the three gifts attacked were obtained when the defendants occupied that position of influence; these transactions, therefore, fell within the rule that where the donee is in a position of confidence or in a position to exercise influence over the donor, it is not necessary to the setting aside of the gift, on the ground of undue influence, that there should be proof of its exercise; undue influence is presumed, and it is for the donee to rebut the presumption; and in this case the defendants had not only failed to rebut the presumption, but had against them the finding of the trial Judge that undue influence was in fact exercised, and that these gifts were the result. Therefore, the gifts could not stand.

*Delong v. Mumford* (1878), 25 Gr. 586, and *Vanzant v. Coates* (1917), 39 O.L.R. 557, 40 O.L.R. 556, followed.

*Held*, as to the will, that, although (1) mental capacity and (2) due execution were shewn, it was not shewn (3) that the document propounded was understood and appreciated by the testatrix and was in truth and fact the expression of her desire; and these three things must be shewn before the rule laid down in *Baudains v. Richardson*, [1906] A.C. 169, 185, that those attacking the will must shew coercion or fraud, can be applied.

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The defendants were in the position of influence; the will was prepared on their instructions, in their presence, and for their benefit; the solicitor who prepared the will—the only independent witness called to support it—did not satisfy himself thoroughly as to the volition and capacity of the testatrix; the circumstances in which the will was prepared and signed were such as to cause grave suspicion, which had not been removed by the evidence; and the trial Judge had found that the evidence of undue influence was overwhelming. The defendants had, therefore, failed to establish the will.

Review of the authorities.

*Tyrrell v. Painton*, [1894] P. 151, 157, and *Murphy v. Lamphier* (1914), 31 O.L.R. 287, 319, specially referred to.

Judgment of KELLY, J., affirmed.

ACTION by Eliza Wannamaker, a sister of Elizabeth Simpson, deceased, to set aside and have declared void certain dispositions of assets and property of the deceased made in her lifetime in favour of the defendants.

The action was tried by KELLY, J., without a jury, at Belleville. *W. C. Mikel*, K.C., for the plaintiff.

*E. G. Porter*, K.C., and *W. Carnew*, for the defendants Jane Livingston, David B. Livingston, and Minnie Livingston.

*G. G. Thrasher*, for the defendant Frankie Detlor.

August 13, 1917. KELLY, J.:—Elizabeth Simpson, who died on the 7th April, 1916, was the sister of the plaintiff and of the defendant Jane Livingston; the defendants David B. Livingston, Minnie Livingston, and Frankie Detlor are the children of Jane Livingston.

The action arises out of various dispositions alleged to have been made by Elizabeth Simpson of her assets and estate.

The plaintiff sets up: (1) that, by undue influence and without consideration, the defendant David B. Livingston procured Elizabeth Simpson to execute what purports to be a conveyance to him, dated the 11th April, 1911, and registered on the 17th April, 1916, of the west half of the south half of lot 11 in the 9th concession of the township of Rawdon, in the county of Hastings, but not to take effect till after Elizabeth Simpson's death; that, at the time of making it, she had not sufficient mental capacity to make a disposition of her property; and that the document is in its character and effect testamentary, and was not executed in pursuance of the Wills Act; (2) that, on the 20th January, 1915, the defendants Minnie Livingston and Jane Livingston persuaded Elizabeth

Simpson, without any consideration, and when she was not of sufficient mental capacity to make such a disposition, to give Minnie Livingston \$1,000; (3) that, at the time of Elizabeth Simpson's death, there was \$8,092.20 on deposit in the Bank of Montreal, in the village of Stirling, in the name of herself and the defendant Jane Livingston; that Elizabeth Simpson did not give, and never intended to give, the defendants these moneys or any part thereof; that the defendants, by undue influence, persuaded her to place these moneys in the bank in the names of herself and her sister, the defendant Jane Livingston, at a time when she had not the mental capacity to perform such an act or transact such business; that this was done to enable the defendant Jane Livingston to obtain control of these moneys; and that, subsequent to Elizabeth Simpson's death, Jane Livingston withdrew these moneys from the bank, and deposited \$3,500 thereof in the same bank in the names of herself and her co-defendant David B. Livingston, and another \$3,500 thereof in the same bank in the names of herself and her co-defendant Minnie Livingston.

It is stated in the evidence and not denied that the plaintiff and defendant Jane Livingston were, at the time of Elizabeth Simpson's death, her only surviving sisters; that no brother survived her; and that there were not then surviving any child or children or descendants of any predeceased brother or sister of Elizabeth Simpson.

The plaintiff therefore asks that the deed already mentioned be declared null and void and be set aside, and to have it declared that she and the defendant Jane Livingston are the owners in common of the lands; and, asserting that she is entitled to one-half of the said \$1,000 and of the said \$8,092.20, she asks payment thereof to her after payment of Elizabeth's funeral and testamentary expenses and debts.

The defendants, other than Frankie Detlor, in their statement of defence, admit the making of the deed and transfer, withdrawal and redeposit of the moneys; and, after setting up reasons why these should be upheld, make this further allegation:—

"On or about the 4th day of July, 1913, the said Elizabeth Simpson made and executed her last will and testament in writing and in conformity with the Wills Act of Ontario, ch. 120, R.S.O. 1914, whereby she supplemented the said deed already made to

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the defendant David B. Livingston, carrying out the obligation placed upon her by the said John Simpson, and carried out her often previously expressed intention of giving her estate to the defendants and keeping it within the family, and which said last will and testament was never revoked by the said Elizabeth Simpson in her lifetime, but remained at the time of her death a valid and effectual testamentary disposition of such estate, real and personal, as she was possessed of at the time of her decease, and to which said will the defendants crave leave to refer on the trial of this action."

Their statement of defence also sets up that the plaintiff is not in a position to prosecute the action, as there is no personal representative of the estate of the deceased before the Court.

The defendant Frankie Detlor, who was by order made a party to the action after delivery of the statement of defence of her co-defendants, submits her rights to the Court and asks payment of her costs.

The defendants having thus raised the issue of the will, the plaintiff in reply attacks its validity upon the two grounds of (1) mental incapacity of the testatrix and (2) undue influence, on the part of the Livingstons, inducing the will.

At the trial but little attention was devoted to the question as to whether the plaintiff is in a position to maintain the action; but evidence of the most exhaustive character was submitted as to the making of the deed, the transfers of the moneys, and the making of the will, and both as to Elizabeth Simpson's mental capacity to enter into any of these transactions and as to the undue influence it is alleged was exerted over her by the Livingstons or some of them in each and every instance. Much of the evidence which was directed to the attack upon the deed and the transfers of the moneys was of service also in helping to a proper understanding of the relations which had grown up between the Livingstons and Elizabeth Simpson, particularly after her brother's death.

When the action was brought, and down to the time of the trial, no personal representative of the deceased's estate had been appointed, and any interest of the plaintiff in the estate is on the assumption either of an intestacy or that Elizabeth Simpson had given, conveyed, transferred, or devised the estate or some part of it to the plaintiff. The only mention in the evidence of any dis-



position or supposed disposition by Elizabeth Simpson, apart from that now attacked, is of a will said to have been made prior to that now set up by the Livingstons, but the terms of which are not stated; I am of opinion that, as matters stood at the time the action was begun, it was not so constituted as properly to determine the questions raised by the statement of claim; and, had the original defendants relied alone upon that ground, I should have felt under obligation, for that reason alone, to dismiss the action. But, the defendants having pleaded the will, and the plaintiff's reply having put its validity in issue, that issue is one, it seems to me, proper to be here tried and determined.

By sec. 38 of the Judicature Act, R.S.O. 1897, ch. 51: "The High Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise," etc. (see *Mutrie v. Alexander* (1911), 23 O.L.R. 396); and, by the Judicature Act, R.S.O. 1914, ch. 56, sec. 13 (2), "All jurisdiction, power and authority which on the 31st day of December, 1912, was vested in or exercisable by a Judge of the High Court shall be vested in and may be exercised by a Judge of the High Court Division, and shall be exercised in the name of the Supreme Court."

The will, which has not been proved, bears date the 4th July, 1913, and purports to give to the defendant Jane Livingston all Elizabeth Simpson's personal estate for her own use during her lifetime, and after her death to the defendants David B. Livingston and Minnié Livingston, in equal shares, subject to a bequest of \$1,000 to the defendant Frankie Detlor, which, should the latter die without issue, would go to David B. and Minnie Livingston, share and share alike, or the survivor of them. It also purports to give to David B. Livingston all her real estate for his own use.

Elizabeth Simpson was unmarried. At the time of her death she was advanced in years; she was older than the plaintiff, who is about 64 years old. Her brother John, who likewise had never married, carried on farming, and she resided with him, doing the housework and helping in the farm operations, as is sometimes done on a farm such as he carried on. John died on the 11th January, 1911, and Elizabeth, who was his chief, if not his sole,

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beneficiary, remained on the farm. The defendants Jane Livingston, David B. Livingston, and Minnie Livingston lived together, about two or three miles distant from Elizabeth; after John's death, his livestock was sold, and the land now in question was rented to the defendant David B. Livingston.

The evidence submitted on the question of Elizabeth Simpson's mental capacity was by members of her family, by neighbours and others who had opportunities of seeing her, some of whom, however, had seen her only very occasionally, and by medical men—one of whom, called for the plaintiff, could not remember having seen Elizabeth except once, which was about 20 years ago, when he was in attendance upon her sister, and another, a resident of Toronto, also called for the plaintiff, had never seen Elizabeth Simpson; his opinion of her mental condition was based solely on what he heard other witnesses say in Court.

Without going into a review of the details of the evidence of these numerous witnesses, I have, after a careful consideration of all the evidence, formed the conclusion that, apart from what may have been her condition for a time following an attack of paralysis in 1915—only a few months before her death—she did not lack the capacity necessary to understand the making of the will. I speak now strictly of her mental capacity, without reference to her liability to have been subject to influences that might have been exerted over her.

She was a person of peculiar disposition, not given to sociability with her neighbours or others, especially in the later years of her life, and not accustomed to going among strangers, or to visit, or to attend church, or even to go on shopping expeditions except at long intervals. She had become careless and slovenly in her care of herself, due not a little to her habit of staying at home and not commingling with other persons. These instances, and particularly her non-attendance at church, which was over and over again emphasised, are urged as indicating a weak mental condition; and minor matters, such as her handling a number of spools in a store when she was purchasing spools, are pointed to in proof that her condition was not normal. Uncleanliness, no matter how much the cleanly may disapprove of it, cannot of itself be accepted as positive evidence of weak-mindedness; and, if absence from church at times when the religiously inclined are found there is to be

regarded as evidence of a similar state of mind, the ranks of the mentally incompetent would be materially added to. The fact is that none of such circumstances relied upon by the plaintiff, nor all of them together, when taken in the light of the important evidence of a large number of other witnesses, is evidence which can safely be relied upon to prove her incapacity.

Persons who had become tenants of the farm and resided in a part of the same house with her spoke of her conduct as indicating an unbalanced condition of her mind. It turns out, however, that she objected to the presence of these persons in the house, and I am not sure but that her conduct towards them was intended to have the very effect which it did have, namely, to induce them to leave.

On the question of undue influence exercised upon Elizabeth Simpson by the defendants other than Frankie Detlor, or by one or other of them, the evidence is overwhelming. Rarely does one meet with a case of such persistent, powerful, and determined exercise of influence. From the time of her brother John's death, these three defendants practically took control, so far as it was in their power, of Elizabeth Simpson, and sought to direct her affairs as they desired; and, by a plan of keeping in close touch with her and her affairs and of throwing obstacles in the way of her having intercourse or communication with others, except when they or some of them were present, they created an atmosphere and a condition which rendered her helpless against their contrivances, suggestions, and designs, when there was a question of dealing with her moneys or assets.

None of these three defendants impressed me favourably when in the witness-box; on many points they impressed me most unfavourably; some of their statements are self-serving, and are not supported by any evidence on which I can rely. After careful consideration of all that was revealed at the trial, and with the opportunities that I then had of estimating the weight that should be attached to the evidence of the defendants the Livingstons, where their own interests are concerned, I am not prepared to accept their statements. Even from their own evidence one gets glimpses at the real nature of the relationship which they established towards Elizabeth Simpson, the power they exercised over her, and the part they played in directing and controlling the

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manner of disposition of her affairs. Of a grasping nature, when anything was to be done, they, or some of them, were on hand to see that it would be carried through as they desired, not as Elizabeth wished; for in their presence and with the control they had obtained over her, her acts were not the exercise of her own will or desire, but of theirs. Having lost by his death the protection and support which her brother's presence afforded, and having then acquired a considerable addition to her moneys and property, a way was open to them to establish their control over her as they did establish it. So set were they on retaining the advantage which that control gave them, that the plaintiff, familiarity between whom and Elizabeth Simpson might be a danger to their plans, was not to be permitted the opportunity of a visit to her sister; and when, through friendly regard, she travelled about 20 miles from her own home—the trip entailing a drive of 3 or 4 hours by carriage—and arrived near Elizabeth's home, she was confronted by the defendant David B. Livingston, who saw to it that the stable was locked to prevent her having accommodation for her horse, and in harsh language he drove her from the premises. She was then forced to go to a neighbour's house to obtain her dinner. When Elizabeth was in a poor condition of health, a short time before her death, the plaintiff made her a visit of 2 or 3 days, but with a good deal of diffidence as to the reception she would receive from the Livingstons, or perhaps it would be more truthful to say David B. Livingston. She then requested that, should her sister shew signs of approaching death, she be communicated with so that she might have opportunity of again seeing her; but her request was not complied with.

On any occasion on which anything was to be done from which any of the Livingstons (I do not include Frankie Detlor) was to obtain an advantage, all or some of them accompanied her.

Jane Livingston's evidence as to what occurred on these occasions is not to be relied on. It is significant that in nearly every instance where there has been opportunity of comparing her statements with the evidence of other witnesses she has been contradicted; even her own statements do not agree with each other. Speaking of the making of the will, Jane Livingston says that when Elizabeth went to the office of Mr. Thrasher, who drew the will, she (Jane) and David B. and Minnie Livingston were present,

and that none of them took part in it. Mr. Thrasher's evidence—and he was not called for the plaintiff—is that all of these parties came together to his office; that the defendant Jane Livingston said they wanted to change the will; that she and her son David B. did the talking and told him how the money was to go; that Elizabeth Simpson had said nothing until he spoke to her; that they wanted to remove Thompson's name as executor; that David B. wanted to get the executor's fees; that, when he read over the will to Elizabeth Simpson, she merely gave assent; and he adds that Elizabeth seemed to listen to the Livingstons. This will was made to take the place of a former will drawn by Mr. Thrasher, on the occasion of the making of which the Livingstons were also present. There is no pretence whatever that Elizabeth Simpson had any opportunity of receiving or had received any independent advice, and it was never suggested to her that she should be independently advised. Mr. Thrasher also says that if strangers had accompanied Elizabeth Simpson to his office he would have made further inquiries; that she created suspicion in his mind about her mental condition; but he gives no explanation of why this suspicion arose.

While all this of itself, in the light of the opportunities the Livingstons had of exercising control over the deceased and the atmosphere with which they surrounded her, would be sufficient to justify setting aside the will, there is other evidence of a corroborative character supporting the charge that she was subject to the influence of these three defendants.

After John Simpson's death a barn was erected upon the farm, and moneys were supplied by Elizabeth Simpson for that purpose, the defendant David B. Livingston having considerable to do with the work. It is intimated that David B. made use of these opportunities to obtain from her more money than was necessary for that purpose. It is true that he received substantial sums from Elizabeth, and he retained the rent of the farm which she was entitled to receive from him as tenant, and he says he applied it to the property.

Referring to her co-defendants, Frankie Detlor says that they were always planning to get Elizabeth Simpson's money and keep it in the family.

Mrs. Francis Bickford says that Elizabeth Simpson said to her,

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when referring to the defendants the Livingstons, that they tried "terribly" to get her money out of the bank; that they carried on "terribly" about the money; and that she (Elizabeth) complained that she could not satisfy them, that they "claimed" they did not get enough money for what they did, and they wanted more.

Mrs. Mary Ann Cook, who has known the family for about 40 years, and lives not far from them, says that from the way Elizabeth Simpson spoke to her it would seem that she had to do as the defendant Jane Livingston told her.

Levi Mason, also an old acquaintance of Elizabeth Simpson, says that from her manner he thought that the Livingstons would easily get control of her.

Louis Altenbright swore that on an occasion since John Simpson's death Elizabeth Simpson had said to him that she had a good deal of money and did not know what to do with it; but that she had to do pretty nearly as the Livingstons told her.

Mrs. Josephine Detlor's evidence was that Elizabeth Simpson would be guided by the Livingstons as she (the witness) guided her children.

Mary Ketcheson swore that Elizabeth said to her that she could not do anything without the Livingstons.

Sophronia Danford, speaking of statements made to her by Elizabeth Simpson about her moneys, said that the impression she got was that Elizabeth was under the Livingstons' control. Elizabeth had said to her that she was afraid of them.

William J. Detlor, husband of the defendant Frankie Detlor, says that he heard the defendant Jane Livingston say that the defendant David B. was getting too much from Elizabeth for the barn, and in order to stop it she had her (Jane's) name put in the bank account.

Jane Livingston denies statements to this effect, but I do not accept her denial.

From these defendants themselves we receive not a little light on the real condition of things. The defendant Jane Livingston says that she supposes she planned it that some of them (the Livingstons) would be present when other persons were going to Elizabeth's; and her admission of what was said to her husband by Elizabeth Simpson with reference to "keeping the whole Livingston family" is significant. I need not refer to other parts



of the evidence in substantiation of what is plainly indicated by that which I have cited.

It would be deplorable if this will were allowed to stand on such evidence. I think the evidence fairly supports the proposition, not only that the relations between these three defendants (the Livingstons) and the deceased Elizabeth Simpson, at and before the time the will was made, were such as to raise a presumption of influence by them over her, but also that such influence was exerted and that it induced the will. Her act in making the will was not the conscious, free and untrammelled expression of her own will, not induced by anything savouring of fraud or undue influence. It was not her act in which she was able to exercise an independent will. In fact it may fairly be said that she had no will in the matter, and that her act was the expression of the will of the Livingstons, and not of her will.

Numerous cases have declared and repeated the law upon the subject of such influence and its results. Sir Samuel Romilly in the argument in *Huguenin v. Baseley* (1807), 14 Ves. 273, at pp. 285, 286, expressed it thus: "The relief stands upon a general principle, applying to all the variety of relations, in which dominion may be exercised by one person over another"—a statement which has been accepted as correctly expressing the law; and, while Judges have been careful not to fetter the jurisdiction of the Court by any enumeration of the descriptions of persons against whom it ought to be freely exercised, Lord Brougham in *Hunter v. Atkins* (1832), 3 My. & K. 113, at p. 140, said: "Where the only relation between the parties is that of friendly habits or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired." That being so, there can be nothing but condemnation for a deliberate design and intention to exercise an influence which is improper and to benefit thereby. See also *Tate v. Williamson* (1866), L.R. 2 Ch. 55, particularly at p. 60; and *Allcard v. Skinner* (1887), 36 Ch. D. 145, at p. 171; *McCaffrey v. McCaffrey* (1891), 18 A.R. 599.

As I have already said, confining my attention to the will only, I do not dispose of or entertain the claim to have the deed and the various transactions relating to the gifts and transfers of the

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moneys set aside. Wide latitude was afforded for the giving of evidence on these matters as well as in respect of the making of the will, and the opportunity was generously made use of. All of this evidence is of service in determining Elizabeth Simpson's mental condition, and it also reveals the relationship which existed, especially after John Simpson's death, between Elizabeth Simpson and the defendants other than Frankie Detlor, an important element of which was a control over her actions. Were I disposing of the questions as to whether the deed and the money transactions to which I have referred should be upheld, I would unhesitatingly say, applying the evidence submitted at the trial, that each and every one of them should be set aside as having been induced and procured by the improper influence of those benefiting thereby. On the same evidence, in so far as it throws light on the making of the will set up in the statement of defence, that will cannot be upheld and should be set aside.

The defendants, other than Frankie Detlor, will pay the plaintiff's costs from the delivery of the statement of defence of these defendants, in so far as these costs relate to the determination of the validity of the will; Frankie Detlor's costs will be paid by the plaintiff, who will add them to her costs against the other defendants.

The plaintiff appealed from the judgment of KELLY, J.

April 24. The appeal came on for hearing before MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*W. C. Mikel*, K.C., for the plaintiff and the defendant Frankie Detlor. This case was spoken to on the 12th March last. Since then the plaintiff has been appointed administratrix of the estate of Elizabeth Simpson.

*R. McKay*, K.C., for the three Livingston defendants. If an amendment is asked by the plaintiff to add her as a party as representative of the estate of Elizabeth Simpson, the Livingston defendants should have the right to cross-appeal, and their rights under a previous will should be protected.

*Mikel*. If an earlier will should be established, the letters of administration cannot stand in the way.

An order was made adding the plaintiff as a party in her repre-

sentative capacity, allowing the Livingstons to cross-appeal, and protecting their rights as asked.

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April 24, 25, and 26. The argument of the appeal and cross-appeal proceeded.

*Mikel.* The learned trial Judge says in his reasons that he would set aside the gifts and deeds if the personal representative were before him. On his reasoning, and on the evidence as it appeared at the trial, these gifts and deeds should now be set aside, the personal representative being before the Court. Undue influence will be presumed in circumstances such as existed in this case, and the onus is upon the donee to rebut the presumption. This the donees here have failed to do: *Vanzant v. Coates* (1917), 40 O.L.R. 556, 39 D.L.R. 485; *Delong v. Mumford* (1878), 25 Gr. 586.

*McKay.* The gifts were reasonable, their purport was thoroughly understood by the grantor, and they should not be set aside. So as to the deed to D. B. Livingston, who was the deceased's only nephew. The defendants have satisfied any onus that lay upon them in this regard. But, however that may be, the plaintiff has not made out a case sufficient to set aside the will. The learned trial Judge has found that there was no lack of mental capacity in the deceased. That being so, the will must stand if it expresses the will of the testator, even if there was undue influence, so long as there was no fraud: *Baudains v. Richardson*, [1906] A.C. 169; *Loftus v. Harris* (1914), 30 O.L.R. 479, 19 D.L.R. 670; *Murphy v. Lamphier* (1914), 31 O.L.R. 287; *Beament v. Foster* (1916), 35 O.L.R. 365, 26 D.L.R. 474. Therefore the learned trial Judge's finding of undue influence with regard to the will cannot be accepted.

*Mikel.* As to the will, the defendants have not proved such a set of facts as will entitle them to invoke the rule in the *Baudains* case, so that they should be allowed probate of the will. But, even if the rule were applicable, there was ample evidence to justify the learned trial Judge in finding, as he did, that the alleged will was not the free and voluntary act of the testator: *McGregor v. Rapelje* (1871), 18 Gr. 446; *Lloyd v. Robertson* (1916), 35 O.L.R. 264, 27 D.L.R. 745; *Hopkins v. Hopkins* (1900), 27 A.R. 658; *Irwin v. Young* (1881), 28 Gr. 511.

*McKay*, in reply.



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June 14. The judgment of the Court was read by FERGUSON, J.A.:—This is an appeal by the plaintiff from a judgment of Kelly, J., dated the 13th August, 1917, in so far as he refused to set aside gifts alleged to have been made by Elizabeth Simpson, deceased, to the defendants Jane Livingston, David Livingston, and Minnie Livingston, and a cross-appeal by these defendants from that part of the judgment which declared that a paper-writing dated the 4th July, 1913, purporting to be the last will of Elizabeth Simpson, deceased, was void.

The parties to the action are all the next of kin of Elizabeth Simpson, deceased, who died on the 7th April, 1916; the plaintiff, Eliza Wannamaker, and the defendant Jane Livingston, being sisters of the deceased, and the other defendants being the children of the defendant Jane Livingston.

As originally maintained, the action was to declare ineffectual or to set aside: (1) a conveyance of part of lot 11, concession 9, township of Rawdon, Hastings county, dated the 13th April, 1911, registered the 17th April, 1916, and made by the deceased to the defendant David B. Livingston; (2) a transfer on the 4th August, 1914, of the bank account of the deceased in the Bank of Montreal, Stirling branch, to the joint credit of the deceased and the defendant Jane Livingston, with a right of ownership in the survivor, there being to the credit of the account at the date of the death \$8,092.20, which the defendant Jane Livingston claims as her own; (3) a gift on the 20th January, 1915, of \$1,000, made to the defendant Minnie Livingston, by a joint cheque of the deceased and Jane Livingston, drawn on the bank account in the Bank of Montreal, Stirling branch.

The plaintiff pleaded that all these transactions were made without consideration, at a time when Elizabeth Simpson was without mental capacity, or were obtained by the exercise of undue influence; that the deed, although signed, was not delivered or registered till after the death of Elizabeth Simpson, and was intended as a testamentary paper, and was not executed as required by the Wills Act; that, although the heading of the bank account was changed on the 4th August, 1915, this was done without authority, and that there was no proper transfer of the moneys from the personal account of the deceased to the joint account.

The defendants, in their pleading, deny the allegations of want of consideration, want of capacity, and undue influence; and allege that the deed attacked was made, executed, and delivered in the lifetime of the deceased; that the moneys in the bank were actually assigned and transferred to the joint account, and claim ownership in the survivor, Jane Livingston. They claim mental capacity in the deceased, and assert the validity of all the transactions. In the alternative, the defendants set up and plead a will, dated the 4th July, 1913, whereby the property of the deceased is devised and bequeathed to these three defendants, except as to the sum of \$1,000 bequeathed to the defendant Frankie Detlor.

The plaintiff joined issue, and in reference to the will pleaded lack of mental capacity and undue influence.

Down to the trial no personal representative of the estate of the deceased had been appointed, but the plaintiff had obtained, under Rule 90, an order allowing the trial to proceed in the absence of any person representing the estate of Elizabeth Simpson.

During the course of the trial, the learned trial Judge expressed the view that, until the plaintiff had been appointed personal representative of the estate of the deceased, she was not in a position to attack the conveyance and gifts; but, subject to this expression of opinion, took the evidence on all the issues raised as if the action had been properly constituted, and found: want of consideration; that the defendants occupied a confidential relationship where they were in a position to exercise influence upon the deceased; that the gifts were made without independent advice, and were the result of undue influence; that, while the deceased did not lack capacity necessary to understand the making of a will, yet that these defendants, being in a position of influence, took the deceased to a solicitor and gave instructions for and procured the drawing and making of the will in their own favour; that they were present during the preparation and execution of the will; that the deceased was without independent advice; that the will was not a conscious expression of the deceased; that she had no will in the matter; and that her act was the expression of the will of the defendants, and not her will.

On these findings, he set aside the will, and declared the deceased to have died intestate, but he refused to set aside the gifts, on the ground that that right of action was vested in a personal representative of the estate of the deceased.

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The plaintiff, relying on the order obtained under Rule 90, appealed; but, on the suggestion of this Court, the hearing of the appeal was adjourned to enable the plaintiff to obtain letters of administration. This was done, and on the opening of the further argument an application was made to add the plaintiff in her capacity as administratrix. The respondents were willing that this should be done, if they were given the right to cross-appeal in reference to the will, and, if unsuccessful in that appeal, hereafter to set up a prior will. On this understanding, an order was made adding the administratrix, and granting the defendants the Livingstons the concessions asked.

The learned trial Judge, in his reasons, carefully, and, I think, accurately, reviews the evidence; but, as the attack made by the appellants in the cross-appeal is directed more to the rules of evidence and the principles of law which governed the learned trial Judge in drawing his deductions from the facts than to his findings of fact, I will not enter into a discussion of the evidence.

I have, however, read and considered the evidence and the exhibits; and, in my opinion, no one can read the evidence as to the relative positions of Elizabeth Simpson and the three defendants whose transactions are attacked, and consider the mental and physical conditions and surroundings of the deceased, and say that there was not evidence on which the learned trial Judge could find that the defendant Jane Livingston and her family other than Frankie Detlor had it in their power to exercise a great, if not a controlling, influence over the deceased, and that the three gifts attacked were obtained when the defendants and each of them occupied that position; that being so, these transactions fall within the rule that if such a transaction takes place when the grantee or donee is in a position of confidence or in a position to exercise influence over the grantor, it is not necessary to the setting aside of such a gift, on the ground of undue influence, that there should be proof of the exercise of undue influence. Undue influence is presumed, and it rests upon the grantee or donee to rebut that presumption by proving that the transaction was righteous and was fairly conducted as between strangers; that the grantor was not unduly impressed by the influence of the grantee; and by satisfying the Court that the grantor, knowing and appreciating the effect of the transaction, acted voluntarily and deliberately,



free from the influence of the grantee: Halsbury's Laws of England, vol. 15, p. 420; *Delong v. Mumford*, 25 Gr. 586; *Vanzant v. Coates* (1917), 39 O.L.R. 557, 37 D.L.R. 471, 40 O.L.R. 556, 39 D.L.R. 485.

The defendants have not only failed to rebut the presumption and to satisfy the other requirements of the rule, but the learned trial Judge has, after seeing the witnesses and weighing their evidence, and passing upon their credibility, come to the conclusion that undue influence was in fact exercised, and that these gifts were all the result of the exercise of such influence. Keeping in mind that in an action to set aside a gift *inter vivos*, where confidence and dependence are shewn on one side and advice and persuasion on the other, such advice and persuasion, although not wrongful or improper, may in such a transaction amount to undue influence—I have, on that branch of the case, no doubt as to the correctness of the judgment appealed from.

Having arrived at the conclusion that the gifts or transfers cannot stand, it is necessary to consider and to pass upon the validity of the will. Counsel for the appellants in the cross-appeal contended that the rules of evidence governing the onus and the proof of undue influence in the making and procuring of a will differ materially from the rules of evidence as to the onus and the proof of undue influence where a gift *inter vivos* is attacked. It is contended that, while the defendants may not have satisfied the onus cast upon them in reference to the gifts, the plaintiff on her part has not made out a case sufficient under the authorities to set aside the will.

The will was executed in manner provided for by the Wills Act, and the learned trial Judge has found that the deceased did not lack mental capacity. On the authority of *Baudains v. Richardson*, [1906] A.C. 169, at p. 185, it is contended on behalf of the defendants that where mental capacity and due execution are established, undue influence cannot be presumed, and that it is in that case necessary to prove that undue influence was actually exercised, and that the will was produced by the exercise of such power, and that it is only when the testator is coerced into doing that which he does not desire to do, that undue influence is in a will case proved; that, if the will expresses the wish of the testator, even if that wish was brought about by persuasion or influence,

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the will must stand, unless the will was produced by fraud or coercion.

The appellants contend that the learned trial Judge failed to appreciate the distinction between undue influence in will cases and undue influence in cases arising out of gifts *inter vivos*; and, for that reason, his finding of undue influence in reference to the will cannot be accepted. While the learned trial Judge, by citing in support of his opinion gift cases only, lends colour to the appellants' contention, I am not satisfied that he did fail to keep in mind the distinction, or that, if he did, and we were called upon now to consider the evidence, having the distinction in view, the evidence would not support the finding of undue influence amounting to coercion. There is a presumption that the opinion of the trial Judge on a question of fact is right, and we should not reverse it unless satisfied that it is clearly wrong: *Colonial Securities Trust Co. v. Massey*, [1896] 1 Q.B. 38. However, I do not think that the decision of the cross-appeal turns upon the finding of undue influence, but upon the finding that "her act in making the will was not the conscious . . . expression of her own will. . . . In fact it may fairly be said that she had no will in the matter."

In my opinion, to call for the proof of undue influence within the meaning of the *Baudains* case, the appellants, in the circumstances of this case, were required to prove affirmatively: (1) mental capacity; (2) due execution; and (3) to satisfy the Court that the document propounded was understood and appreciated by the testatrix and was in truth and fact the expression of her desire; and that it was not until the defendants had established these things that the rule taken from the *Baudains* case cast upon the plaintiffs the onus of proving coercion or fraud. Lord Macnaghten, at p. 179, in the *Baudains* case, says:—

"There are no suspicious circumstances in this case to bring in the wholesome rule laid down in *Barry v. Butlin* (1838), 2 Moo. P.C. 480, and approved in *Fulton v. Andrew* (1875), L.R. 7 H.L. 448."

The rule in these cases is discussed in many authorities in England, and in our own Courts: See *British and Foreign Bible Society v. Tupper* (1905), 37 S.C.R. 100; *Connell v. Connell* (1906), 37 S.C.R. 404; *Loftus v. Harris* (1914), 30 O.L.R. 479, 484; *Palmer v. Palmer* (1916), 10 O.W.N. 70.

In *Fulton v. Andrew*, Lord Hatherley, at pp. 471, 472, states the rule as follows:—

“A person who is instrumental in the framing of a will, as these two persons undoubtedly were, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction.”

In none of these authorities have I found the rule better expressed than by Lindley, L.J., in *Tyrrell v. Painton*, [1894] P. 151, at p. 157, where he says:—

“The rule in *Barry v. Butlin*, 2 Moo. P.C. 480, *Fulton v. Andrew*, L.R. 7 H.L. 448, and *Brown v. Fisher* (1890), 63 L.T. 465, is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.”

The appellants in the cross-appeal were in the position of influence. The will was prepared on their instructions and in their presence and for their benefit.

The one independent witness called in support of the will was the solicitor Thrasher, who prepared it. In *Murphy v. Lamphier*, 31 O.L.R. 287, at p. 319, Chancellor Boyd in giving judgment says:—

“Where instructions are given by an interested party, it is the bounden duty of the solicitor to satisfy himself thoroughly as to the testator’s volition and capacity, or, in other words, that the

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instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as a will."

The evidence of this witness was not such as to satisfy the learned trial Judge that the testatrix knew and approved of the contents of the document. The solicitor-witness performed none of the duties mentioned by the learned Chancellor; he admits that he had suspicions as to the mental capacity of the testatrix; he throws doubt upon her knowledge and understanding of the will; he did not discuss the will with her or make any attempt to ascertain whether or not she understood and appreciated it; he gave her no independent advice in reference to the matter; he admits that the instructions were not received from her, but were received from the appellants, and that he drew the will on these instructions, in the presence of the appellants. All that he did to ascertain the mind of the testatrix in reference to the will was to read the will over, and on her statement, "I guess it is right," have her execute it in the presence of the beneficiaries. He attempts to excuse his conduct by stating that, had he been dealing with or received instructions from strangers instead of from the relatives of the testatrix, he would, on account of his suspicions, have thought it his duty to have more fully discussed and considered the matter with the testatrix. This witness was called by the appellants in the cross-appeal. His excuse for not taking more care or performing his duties as a solicitor, particularly when his suspicions were aroused, may be some justification to his own conscience, but they do not remove from my mind the doubt as to whether or not the testatrix knew and appreciated what she was doing.

In the will itself there is at least one thing which arouses suspicion and requires explanation. The testatrix was a spinster, and yet in her will she describes David B. Livingston and Minnie Livingston as "my two children." The fact that she described the two children of her sister Jane Livingston as "my two children" indicates both that the testatrix did not know and appreciate all that was written in the will, and that the draftsman acted upon the instructions of the defendant Jane Livingston rather than on the instructions of the testatrix.

The circumstances under which the will in question was prepared and signed are such as to cause grave suspicion. These suspicions and doubts are not removed from my mind by the

evidence. The learned trial Judge has, on the evidence, gone further and found:—

“On the question of undue influence exercised upon Elizabeth Simpson by the defendants other than Frankie Detlor, or by one or other of them, the evidence is overwhelming. Rarely does one meet with a case of such persistent, powerful, and determined exercise or influence . . . they created an atmosphere and a condition which rendered her helpless against their contrivances, suggestions, and designs, when there was a question of dealing with her moneys or assets. . . . It would be deplorable if this will were allowed to stand on such evidence. I think the evidence fairly supports the proposition, not only that the relations between these three defendants (the Livingstons) and the deceased Elizabeth Simpson, at and before the time the will was made, were such as to raise a presumption of influence by them over her, but also that such influence was exerted and that it induced the will. Her act in making the will was not the conscious, free and untrammelled expression of her own will, not induced by anything savouring of fraud or undue influence. It was not her act in which she was able to exercise an independent will. In fact it may fairly be said that she had no will in the matter, and that her act was the expression of the will of the Livingstons, and not of her will.”

As pointed out in *Fulton v. Andrew*, these rules of evidence are not unyielding rules of law, but are rules of evidence to guide the Court in arriving at a conclusion; and, after all, the question is, have the parties who took part in the framing of a will under which they benefit, satisfied the Court that the will expresses the conscious desire of the testatrix? That was a question of fact, on which the learned trial Judge, who had the advantage of seeing the witnesses and passing upon their credibility, was in a much better position to arrive at a conclusion than we are.

I am, therefore, of the opinion that the appellants in the cross-appeal fail, first because they did not in their proof establish a case for the application of the rule in the *Baudains* case, or to entitle them to have the will admitted to probate; secondly, because I cannot say, even if the rule in the *Baudains* case were applied, that there was not evidence on which the learned trial Judge could find as he did.

I would allow the appeal and dismiss the cross-appeal, both

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with costs, except in so far as the costs of the appeal have been increased by reason of the adjournments and amendments; the form of the judgment to be such as to protect the defendants, and to allow them to take proceedings, if so advised, to establish a prior will.

In the view I take of the case, it is not necessary to deal with the other questions raised as to the validity of the deed and the transfer of the moneys in the bank.

*Appeal allowed; cross-appeal dismissed.*

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[APPELLATE DIVISION.]

June 14.

GERARD V. OTTAWA GAS CO.

*Negligence—Explosive Found by Boy in Box Left in Highway Unlocked—Injury to Boy—Liability of Employers of Workmen in Charge of Box—Direct Conflict of Evidence as to Presence of Explosive in Box—Findings of Jury—Actual Knowledge of Defendants—Onus—Meaning of Findings—Indefiniteness.*

The infant plaintiff, a boy of 9 years, was injured by an explosive stick which he said he found in, and took from, a tool-box standing at the side of a street in a city, unlocked. The box belonged to the defendants, and was being used by their workmen, who were digging a trench in the street. In an action to recover damages for the boy's injury, it was alleged that the defendants were negligent in leaving explosives in the unlocked box. At the trial, the defendants' workmen were called as witnesses and denied that there were any explosives in the box. The jury, in answer to questions, found: (1) that the infant plaintiff obtained the explosive which injured him from the defendants' box; (2a) that the defendants "may not have known" it was there; (2b) that the defendants ought, by the exercise of reasonable care, to have known that it was there; (3) that the explosive was in the possession of the defendants when the infant plaintiff obtained possession of it; (4) that the defendants were guilty of negligence in their care of the explosive; (5) that the negligence consisted in not locking their tool-box; (6) that the defendants' negligence caused or contributed to the accident; (7) that the infant plaintiff was not guilty of any negligence which caused or contributed to the accident:—

*Held* (HODGINS, J.A., dissenting), that judgment was properly entered for the plaintiffs upon the findings.

The main question, whether the boy had obtained the explosive from the defendants' tool-box, was a question for the jury, and their finding could not be disturbed.

Upon findings (2a) and (2b) it was argued that the defendants were entitled to judgment on the ground that they would be liable only in case there was actual knowledge on their part; but it was *held*, that, the jury having found that the explosive was in the defendants' box, the onus was upon them to shew that it had come there in some way for which they were not responsible, and this they had failed to do.



*Per* HODGINS, J.A.:—The workmen, while servants of the defendants, had nothing to do with the explosives, and all denied knowledge of their presence in the box. The answers to questions (2a) and (2b), taken in connection with the other findings, must either mean that the workmen did not themselves know of the explosives in the box, in which case it was hard to find negligence in not guarding them, or that, if they did know, they were not servants whose knowledge was sufficient to charge the defendants with actual knowledge, and that reasonable care demanded more. Proper deference to the finding of a jury is limited to cases where there is a definite finding of fact, and not a general statement of want of care without proof given or reason assigned. Carelessness in acquiring or neglect to obtain knowledge may, in some cases, be equivalent to knowledge; but there must be a definite finding. The verdict was an unsatisfactory one, and the defendants were entitled to a new trial.

Review of the authorities.

*Newberry v. Bristol Tramways and Carriage Co. Limited* (1912), 107 L.T.R. 801, specially referred to

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AN appeal by the defendants from the judgment of MULOCK, C.J., Ex., at the trial, upon the findings of a jury, in favour of the plaintiffs.

The action was brought by John Gerard, a boy of 9 years of age, by his father as next friend, and by the father as a plaintiff in his own right, to recover damages arising from an injury to the boy from an explosive said to have been negligently left in a tool-box on wheels, by the defendants' servants, on the side of a street in the city of Ottawa, where they were digging a trench for the laying down of gas-pipes.

The jury awarded the boy \$700 damages and his father \$100, and judgment was given in their favour for these sums, with costs.

February 4. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*G. F. Henderson*, K.C., for the appellants. The appellants' workmen had no reason for using any explosive in carrying on their work, and positively swore that there was no explosive in the tool-box. The only witnesses who swear that the explosive was there are the infant plaintiff and his brother. Various circumstances tend to shew that the evidence of the boys should not be accepted. The injury was to the left hand, and could not possibly be caused by a stick of dynamite. The descriptions given by the boys are not applicable to any known explosive, and would rather suggest that the accident was caused by a giant fire-cracker. It would be an act of insanity to keep explosives in a tool-box, and the jury's verdict in this regard was perverse. The injured boy,

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9 years of age, was an attractive little fellow, towards whom the attitude of the trial Judge was very sympathetic, but reliance should not be placed upon his story. Even though it were believed, the defendants are entitled to judgment, upon the jury's answer to the second question, which is practically "No," and there is no evidence to justify their answer to the 3rd question. If the explosive was put in the box, it was by the act of a stranger, or of an employee acting outside of the scope of his employment; the defendants had no knowledge of its being there, and consequently no duty in respect of it. The case is brought as one of negligence, not of nuisance, and should be approached from that angle. The defendants were doing lawful work in a lawful way, and a duty would not be cast upon them unless some officer of the company knew, or should have known, about the matter. The charge of the trial Judge assumes knowledge on the part of the defendants, and in this respect the charge was improper and misleading. There is a complete absence of evidence of knowledge on our part, and before a duty arises there must be knowledge. He referred to *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398; *Robinson v. Village of Havelock* (1914), 32 O.L.R. 25, 20 D.L.R. 537, and, on the question of scope of authority, to Halsbury's Laws of England, vol. 20, p. 252, para. 601; *Williams v. Jones* (1865), 3 H. & C. 602; *Forsyth v. Manchester Corporation* (1912), 29 Times L.R. 15; *Radley v. London County Council* (1913), 29 Times L.R. 680. Reference was also made to *Crane v. South Suburban Gas Co.*, [1916] 1 K.B. 33, where the defendants were held liable on the ground of nuisance.

A. E. Fripp, K.C., for the respondents, the plaintiffs, argued that the evidence of the infant plaintiff was corroborated by that of his brother, and the jury were justified in accepting it, and disbelieving the defendants' witnesses. This is really a case of nuisance, and it was so treated by the trial Judge. He relied upon the *Crane* case, *supra*, and argued that the defendants were really in the position of having set a trap, and were liable for the consequences. The trial Judge does not depart from the judgment in the *Latham* case, but goes a step further. The *Robinson* case is distinguishable, as here the article which caused the accident was dangerous in itself.

Henderson, in reply, argued that the case could not be regarded as depending upon nuisance.

June 14. MACLAREN, J.A.:—This is an appeal by the defendants from a judgment for \$700 in favour of John Gerard, a boy of 9 years of age, and \$100 to his father, amounts awarded by a jury for damages sustained by the boy from an explosive said to have been negligently left in a tool-box on wheels, by the defendants' servants on the side of a street where they were digging a trench for the laying down of gas-pipes.

The story of the boy was, that at the noon hour, while the workmen were resting and sleeping at some distance on the other side of the street in the shade, he was on his way to school, and peered into the box, which had the lid up, and saw in a smaller box the explosives (sticks, he calls them), one of which he took and hid in an adjoining field, where he left it for about two weeks, when he went for it and carried it in his pocket for two days. In playing with it he struck it violently against a stone. An explosion followed, which carried off part of the thumb and parts of two fingers of his left hand.

As to his finding and taking the explosive, he is corroborated by his older brother, Thomas, 11 years of age, who was with him, and who tried to take the stick from him, but did not succeed. His description of the stick does not tally closely with the plaintiff's, but that is of little importance, as he only got a glimpse of it.

The defendants produced the foreman and the men who worked on the job in question, and they all swore that they had used no explosives on that street, and had not done so anywhere that season, and that there was no such small box of explosives in the cart; also that they always took their mid-day meal around the tool-cart, as it was on the shady side of the street, and that they never all left that spot during that hour, as the boys alleged; and that there was no such small box or such explosives, or any explosive, in the cart-box while they were working on that street, and that it was impossible for the plaintiff to have got the explosive as he claimed.

They also produced a policeman and companions of the infant plaintiff, who swore that he had at the time given them accounts widely different from what he stated in the witness-box.

The following are the questions submitted by the trial Judge to the jury and the answers given by them:—

"1. Where did the infant plaintiff obtain the explosive which injured him? A. In the Ottawa Gas Company's tool-box.

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"2. If from the defendants' tool-box: (a) did the defendant company know it was there? A. May not have known. (b) Ought they, by the exercise of reasonable care, to have known that it was there? A. Yes.

"3. Was the explosive in the possession of the defendant company when the infant plaintiff obtained possession of it? A. Yes.

"4. Were the defendant company guilty of any negligence in their care of the explosive? A. Yes.

"5. If so, in what did such negligence consist? A. In not locking their tool-box.

"6. If the defendants did not exercise reasonable care, did such negligence cause or contribute to the accident? A. Yes.

"7. Was the infant plaintiff guilty of any negligence which caused or contributed to the accident? A. No.

"8. What damages do you award: (1) To Mr. Gerard? A. \$100. (2) To Jack Gerard? A. \$700."

The questions were submitted to counsel before they addressed the jury; and, after some discussion, they both expressed themselves as satisfied with them.

The main issue in the case was, whether the infant plaintiff had obtained the explosive in question from the defendants' tool-box. On the one side was the direct, positive, affirmative testimony of the two boys; against this the strong statements of the defendants' workmen that there was no such explosive in their box. It was peculiarly a case for the jury, and they have seen fit to accept the story of the boys, as they had a perfect right to do.

When the jury brought in their verdict, counsel for the defendants urged that, under the answers of the jury to questions 2 (a) and 2 (b), they were entitled to judgment, on the ground that the company would only be liable in case there was actual knowledge on their part. In my opinion, the jury having found that the explosive was in the defendants' box, the onus was upon them to shew that it had come there in some way for which they were not responsible, and this they wholly failed to do.

The verdict was, moreover, satisfactory to the trial Judge, and I do not think we can interfere with the judgment.

In my opinion, the appeal must be dismissed.

MAGEE and FERGUSON, JJ.A., agreed with MACLAREN, J.A.

HODGINS, J.A.:—Appeal from the judgment at the trial, the jury's answers to questions being construed as entitling the respondents to judgment.

Hamilton, L.J., in *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, at p. 413, states a proposition of law which, if applicable, covers this case. He speaks of the general rule "that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself . . . that injury would not have occurred."

In *Ruoff v. Long & Co.*, [1916] 1 K.B. 148, Avory, J., adds this (p. 152): "To determine whether this negligence (if any)," (i.e., leaving a steam lorry unattended on the street), "was an effective or proximate cause of the damage the question to be answered is this: Admitting that the accident would not have occurred but for the intervention of a third person, was such an intervention a thing which the defendants as reasonable men ought to have anticipated?"

[The learned Judge then set out the jury's findings, as above.]

It is plain that the direct contradiction between the parties has been settled by the jury's answer to the 1st and 5th questions. The result of these answers is that the explosive was left in an unlocked box on the highway, the servants of the appellants being at some little distance at their dinner.

But these men, while servants of the company, had nothing to do with the explosives, and all denied any knowledge of their presence in the box. The jury say (Q. 2) that the appellants may not have known that the explosives were in the box, but ought to have been informed of the fact if they had exercised reasonable care.

That answer, taken in connection with the other findings, must either mean that the company's men at work did not themselves know of the explosives being in the box, in which case it is hard to find that negligence consisted in not guarding them, or that, if they did know, they were not employees whose knowledge was sufficient to charge the company with actual knowledge, and that reasonable care demanded something more.

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But what was in the jury's mind is not specified, and yet that is just what the Court must know in order to be sure that what they may have considered lack of reasonable care was really such as a matter of law. There is no use asking the jury questions, if their answers are not specific or are so vague as to render it necessary to spell out what they meant. It must be reasonably clear from the charge and their response that some definite act or omission is intended. This is particularly so when, on examining the charge, it becomes apparent that what was said upon question 2 (b) had reference really to reasonable care in guarding against danger from the explosive and not to reasonable care in acquiring the knowledge that it was in the box; and the jury may therefore have so interpreted the question.

It has been decided that, where there are several acts of negligence set up in the evidence, the jury's finding of one or more excludes the others.

But, if they have not specifically named anything, is it to be determined that they meant to include all that are suggested in the charge, especially in such a wide field as reasonable care? Then again, if the company did not know or may not have known, how could they have contemplated an act by a boy or other passer-by being such as to cause damage to him or others? No question was put to them on this head, and their attention was not directed to it—and it cannot be premised that, under the circumstances as found, the company should have so anticipated if they did not in fact know. The importance of this is obvious from the fact that, unless such a question is properly found against the company, they cannot be made liable: *McDowall v. Great Western R.W. Co.*, [1903] 2 K.B. 331, and *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, 413; *Geall v. Dominion Creosoting Co.* (1917), 55 S.C.R. 587, 589, 592, 598, 607, 609.

While, therefore, every respect should be paid to the finding of a jury, I am of opinion that proper deference thereto is limited to cases where there is a definite finding of fact, and not a general "statement of want of care without proof given or reason assigned, based upon the jury's own inner consciousness and on their own notions of the fitness of things," to quote from Lord Justice Hamilton's words in *Newberry v. Bristol Tramways and Carriage Co. Limited* (1912), 107 L.T.R. 801.



I think this is all that is meant by Lord Atkinson in *Toronto R.W. Co. v. King*, [1908] A.C. 260, when he says (at p. 270): "They" (the jury) "are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought not to be disturbed because they are not such as judges sitting in courts of appeal might themselves have arrived at."

In *Lewis v. Grand Trunk Pacific R.W. Co.* (1915), 52 S.C.R. 227, 26 D.L.R. 687, the Supreme Court of Canada decided that want of definiteness rendered the jury's answers unsatisfactory; and in *Ryan v. Canadian Pacific R.W. Co.* (1916), 37 O.L.R. 543, this Court sent the case back for a new trial because the cause of the accident was obscure on account of the want of particularity in the answers of the jury as to the connection between what they called negligence and the accident itself.

In the latter case the jury had not followed the request of the trial Judge that they should find how the negligence alleged had caused the plaintiff's death. In this case they were not directed on that point. I have not fully considered the question argued that actual knowledge of the presence of the explosives was a condition precedent to liability for want of reasonable care, but at present I do not see why, as a matter of law, carelessness in acquiring or neglect to obtain knowledge may not, in some cases, be urged as equivalent to knowledge.

The verdict is, in view of the foregoing, an unsatisfactory one, and I think the appellants are entitled to a new trial, the costs of which should be in the cause.

The respondents should pay the costs of the appeal in any event of the action.

*Appeal dismissed (HODGINS, J.A., dissenting).*

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## TYRRELL V. TYRRELL.

June 14.

*Executors and Administrators—Charge of Fraud against Executors—Failure to Prove—Finding of Trial Judge—Appeal—Position of Executors—Bare Trustees—Purchase from Cestui que Trust—Limitations Act, secs. 46, 47, 48—Acting Honestly and Reasonably—Liability of Executor to Account as Individual for Proceeds of Sale of Lot Conveyed to him—Absence of Concealed Fraud—Bar by Statute—Claim to Share of Fund Found by Surrogate Court Judge to be in Hands of Executors—Order on Passing Accounts—Finality—Right to Recover Share of Fund by Action—Settled Account—Interest—Costs.*

Under a will, the defendants, two of the four sons of the testator, were trustees of property which was vested in them, and was to be distributed among the four in equal shares, the distribution being left in the hands of the four individually, and not in the hands of the defendants as trustees and executors. The complaint of the plaintiff, one of the four, was that, certain residuary real estate having been apportioned in shares, the defendants, by fraud, obtained from the plaintiff a deed of his share, sold it to an innocent purchaser, and then laid out the proceeds in other land, on which they had made a profit:—

*Held*, affirming the finding of RIDDELL, J., the trial Judge, that no fraud or overreaching on the part of the defendants had been shewn.

In the distribution, the homestead was conveyed to R., one of the defendants, and in the conveyance was included lot 2, which was not a part of the homestead, and was not mentioned by the defendants as part of R.'s share, and not noticed by the plaintiff when he signed the deed, which he did without reading it, although he was requested to read it:—

*Held*, that the defendants as to the division did not stand towards the plaintiff in a fiduciary relationship: they were bare trustees, bound to divest themselves of the legal estate in the way determined by the four; and were not brought within the rule against purchases from *cestuis que trust*; but, assuming that they were trustees, they acted honestly and reasonably, and should, after the lapse of many years, have the benefit of secs. 46, 47, and 48 of the Limitations Act, R.S.O. 1914, ch. 75.

And *held*, as to R., that, having got lot 2 as part of his share, and having sold it and received the proceeds, he should account personally to the plaintiff for his share thereof, were it not that the Limitations Act was a bar in his case also—there was no concealed fraud which prevented him from claiming the benefit of the statute.

The plaintiff also claimed in this action to recover one quarter of the amount found by a Surrogate Court Judge to be in the hands of the defendants as executors. It appeared that the Judge had, in taking the accounts, allowed the parties for all the payments made by them during the father's lifetime in order to preserve the property, and had deducted the amount of these payments from the amount for which the executors were chargeable:—

*Held*, that the evidence before the Judge warranted this, and his approval was final and binding upon all the parties represented, except in so far as fraud or mistake might be shewn.

*In re Wilson and Toronto General Trusts Corporation* (1908), 15 O.L.R. 596, followed.

*Held*, also, that the plaintiff was entitled to bring an action upon the footing of these accounts just as if they were settled accounts, in case due payment was not made by the executors, or might make an application for an administration order if circumstances warranted that course.

*Held*, therefore, varying the judgment of RIDDELL, J., that the plaintiff was entitled to judgment for his share of the moneys in the hands of the defendants, with such interest as the amount had borne since it was paid into Court in this action.

*Held*, also, in view of the way in which the charge of fraud was persisted in, that the plaintiff should have no costs of the action, and the defendants should have their costs as executors out of the estate down to the date of the payment into Court, of which the share of the plaintiff should pay one quarter, and the plaintiff should pay the defendants' costs after the date of payment into Court, and that there should be no costs of the appeal.

*Bruty v. Edmundson*, [1917] 2 Ch. 285, [1918] 1 Ch. 112, referred to.

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AN action for an account and consequent relief.

June 25, 1917. The action was tried by RIDDELL, J., without a jury, at Toronto.

*W. Laidlaw*, K.C., for the plaintiff.

*W. D. McPherson*, K.C., for the defenadnts.

October 10, 1917. RIDDELL, J.:—I strongly advised the parties to settle the dispute, which is between brothers, members of a most respectable family: and in the meantime acceded to the request of counsel to be allowed to put in written argument and authorities.

The decision has been delayed thus long (after vacation) in the hope that a seemly arrangement might be made by the parties: that appears not to be feasible—I have gone over the case again and read the arguments with care, and now proceed to dispose of the matter.

The statement of claim sets out in substance that the defendants, two brothers and brothers of the plaintiff, were executors of their father's will; that certain residuary real estate was divided amongst the three; and that, by misfeasance, misrepresentation, pressure, and fraud, the defendants obtained from the plaintiff a deed of his share, sold it to an innocent purchaser, and then laid out the proceeds in other land, on which they have made a profit.

The plaintiff, admitting that he cannot set aside the deed owing to the sale to an innocent purchaser, claims an account of the dealings of the defendants with the proceeds of the sale, and consequent relief.

By para. 20 (and last) of the statement of claim it is alleged "that the defendants were liable and accountable as the trustees and executors of the said will to the plaintiff for one-fourth of the said sum of \$5,024.11, adjudged as aforesaid by the Surrogate Court of the County of York . . . ." Nothing had been stated in the claim as to this sum; but it appeared at the trial and by the



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statement of defence that the Surrogate Court of the County of York had taken the accounts of the defendants as executors, and found a sum of \$5,024.11 in their hands, to one-fourth of which the plaintiff would be entitled.

The plaintiff offers to allow the \$1,000 he received for his land from the defendants to be credited upon his share of this \$5,024.11, and claims the balance with interest and compound interest—or, in the alternative, the one-fourth of \$5,024.11 and interest and compound interest.

The defendants deny all fraud and improper conduct on their part, claim the benefit of the Limitations Act, R.S.O. 1914, ch. 75, secs. 46, 47, 48, and “the other sections” of this statute.

As to the \$5,024.11, they say that they tendered the one-fourth to the plaintiff and his solicitors before action, but the tender was refused: they ask by way of counterclaim a declaration that this is all the plaintiff is entitled to. As to this claim I declined to dispose of the matter, thinking that the whole question was one for the Surrogate Court. Moreover, it appeared that the defendants were not fully satisfied with the determination of the Surrogate Court—they ask for an extension of time to appeal. I think such an application must be made to the full Court.

I think the proper course to pursue is to strike out all reference in the pleadings to the \$5,024.11, without prejudice to the plaintiff bringing a new action in the premises if so advised—the defendants then may place the proper pleadings on the record—and if this Court should deal with the matter the whole question can be tried.

If, however, the question should have been, in the opinion of an appellate tribunal, disposed of by me, I find that the evidence of the plaintiff is wholly unreliable and that of the defendants to be accepted.

It is a painful duty which is cast upon me to determine the credibility of the witnesses. I carefully observed their conduct and demeanour in the witness-box, and from that observation I am forced to the conclusion that the plaintiff's testimony cannot be accepted or relied upon as true. Whether it be from some original defect of mind or conscience or from some extraneous cause, his evidence is wholly unreliable. I would so consider even if and when he was uncontradicted: but when contradicted, as he was in many

matters, the conclusion is inevitable. I believe the evidence of the witnesses called for the defence from having observed their conduct and demeanour in the witness-box.

The plaintiff wholly fails in the attempt to prove fraud or improper conduct on the part of the defendants or of either of them; and the action must (subject as above) be dismissed with costs.

The plaintiff appealed from the judgment of RIDDELL, J.

April 15, 16, and 17, 1918. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*W. Laidlaw, K.C., and Christopher C. Robinson*, for the appellant, argued that he should be paid the money in the hands of the defendants to which he was entitled, together with interest, and that the deed given by him to them should in some respects be declared void. There is such a thing as legal, as opposed to moral, fraud, and it is with this that the defendants are chargeable on the undisputed evidence. The concealment of the fact that the deed of the homestead property in Weston included one acre which was clearly no part of the homestead property, was of particular significance. The appellant's contention is not that the defendants were guilty of actual fraud, but of improper conduct as between themselves as trustees and the appellant as *cestui que trust*. The appellant was entitled to be made fully aware of all circumstances relating to the transactions in question: Halsbury's Laws of England, vol. 28, p. 166 *et seq.*, paras. 342, 345; *In re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502, *per* Kay, J., at p. 512, where he cites the judgment of Jessel, M.R., in *In re National Funds Assurance Co.* (1878), 10 Ch. D. 118, at p. 128; *Dougan v. Macpherson*, [1902] A.C. 197; *In re Hallett's Estate* (1879), 13 Ch. D. 696, 733; *Waters v. Donnelly* (1884), 9 O.R. 391; *McCaffrey v. McCaffrey* (1891), 18 A.R. 599; *Denton v. Donner* (1856), 23 Beav. 285, 290; *Smedley v. Varley* (1857), 23 Beav. 358. *Plowright v. Lambert* (1885), 52 L.T.R. 646, 651, is particularly important, as it is exactly in line with the case at bar.

*W. D. McPherson, K.C., and Shirley Denison, K.C.*, for the respondents, the defendants, referred to certain circumstances as warranting the trial Judge in refusing to credit the plaintiff's

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testimony, and argued that there was no evidence that lot 2 had been "divided up" by the defendants, as alleged by the plaintiff. The solicitor Nason was acting for all parties, and there was no concealment of any fact from the plaintiff. From 1896 to 1904 the members of the family other than the plaintiff were making contributions in order to keep the property together, for which they should receive credit. The great lapse of time since the occurrences that are in question should raise a presumption in favour of the defendants: *Vatcher v. Paull*, [1915] A.C. 372, *per* Lord Parker of Waddington, at p. 382. All the brothers had plans of the property before them, and the plaintiff was not a careless man, and was told where lot 2 was going. They referred to *Coles v. Trecothick* (1804), 9 Ves. 234, and to circumstances which shew that the *Plowright* case is only to a limited extent an authority in favour of the plaintiff. The head-note of that case is not in accordance with the opinion.

*Laidlaw*, in reply, stated that he relied on *Dougan v. Macpherson*, *supra*. He cited *Nocton v. Lord Ashburton*, [1914] A.C. 932, 978, and the Surrogate Courts Act, secs. 21, 34, 70, 71.

June 14. The judgment of the Court was read by HODGINS, J.A.:—I see no reason for differing from the conclusion at which the learned trial Judge arrived, that no fraud or overreaching had taken place on the part of the respondents; the brothers seem until 1915 to have been on friendly and indeed affectionate terms, and no evidence has been put forward which would indicate in any way intentional misrepresentation nor a desire to take even the smallest advantage of the appellant. So far from this being the case, I find that in 1909 James sent the appellant a gift of \$50, out of the sale of some lots, because he thought his father would have liked him to do this; and that, as late as 1913, Robert sent the appellant one quarter of the first payment made by a purchaser of two lots which had not been included in the division. I think any Court would find it hard to accept the appellant's plea of hardship and bankruptcy in May, 1905, in view of his own letters of the 9th February, 1905, and the 30th March, 1905.

There remain however, notwithstanding the acceptance of that finding, several contentions to be considered.

It is clear that the deed to the respondent Robert Tyrrell of



the homestead included lot No. 2, which was not a part of the homestead, but was situate at some substantial distance therefrom. It was said that it was used as a cow-pasture, and was understood to be in some way appurtenant to the homestead, but that is not established as having been brought home to the mind of the appellant, nor indeed does it seem to be clearly made out on the part of the respondents.

It is also evident that there was in the hands of the trustees, at the time the appellant sold out, money belonging to the estate and undistributed, to which I shall refer later.

It was argued that the inclusion of lot 2 in the deed of the homestead, while overlooked by the appellant, should have been clearly disclosed by the trustees, and it was suggested that knowledge of the additional lot might have affected the appellant's mind in regard to his agreement to sell for \$1,000 his share in the Weston property, and that the price of \$1,000 was an inadequate price for his share.

Much stress was laid upon the financial and family conditions surrounding the appellant at the time he made the bargain to sell; and, in addition to this, the matter of lot 2 and the money in the hands of the executors at the time was stressed. Reliance was also placed upon some statement in a letter from Robert to the effect that there was nothing coming out of the Adelaide street property beyond what was enough to pay the debts. But that letter, dated the 13th March, 1905, may have had reference to the amounts advanced during the lifetime of the father to preserve the property and to the immediate charges upon the cash payment. It can have no probative force in establishing misrepresentation as to the ultimate receipts from the sale of that property, because in exhibit 19, dated the 1st December, 1904, just 4 months before, Robert had told the appellant the exact terms of payment. In it he reported the sale for \$12,000 just before the father's death, and wound up with the remark that "after paying expenses there is to be an apparent sum of \$6,500 to the good when paid in." The \$2,000 cash-down payment mentioned in that letter had been included in a sum of \$2,449.64 received just the day before, viz., the 30th November, 1904, and if to the net advances made by the brothers, amounting at that time to \$975.61, there are added the payments necessarily attributable to that prop-

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erty, only \$314.96 remains out of the \$2,000. These payments, so far as clearly applicable, are: commission on sale, \$210; roofing, \$125; interest, \$224.43; H. G. Tyrrell, \$150; and there are others which, if explained, may be likewise of the same class. It is therefore left in doubt just what Robert meant by his statement, and it is always well not to strain the language of friendly letters to mean something probably quite foreign to the purpose of the writer.

I think the evidence has quite failed to establish inadequacy of price. The appellant was given the right to choose 25 lots or to allow his brother to select them and then to take the remaining 75 lots. When the decision was made, the offer was "buy" or "sell" on that basis. While such an alternative offer is not conclusive on the question of fairness, it may and does in this case, I think, possess that quality. The appellant was sufficiently aware of the situation of the property and its surroundings and of the state of the real estate market to say in his letter that he hoped and expected that his brother would make a considerable amount out of the property more than he was paying for it. This remark, I think, pretty clearly illustrates the way in which the appellant was looking at the matter. He was getting cash for something which might in the future realise more, and he was willing to act on the principle that "a bird in the hand is worth two in the bush." He visited Weston in January, 1906, in May and June, 1908, and made no complaint as to his bargain.

It is nowhere suggested by the appellant that he would have asked more had he known that lot No. 2 was still undisposed of; while the small amount realised from it, after the lapse of all these years, leads to the belief that, even if he had known all about it, it would have made no difference as to the amount he was willing to accept. The fact that no mention was made of the moneys in the hands of the executors, when the appellant was bargaining for the sale of his share in the vacant land at Weston, has been pointed to as an important consideration in shewing that he was overreached. I find, however, that in a letter from James to the appellant, dated the 9th December, 1904, the following sentence appears: "The estate is, I think, worth \$16,000 over and above incumbrances." So that the appellant, with the proposed division before him in the letter of the 9th January, 1905, and the valuation

therein of the homestead and the big dwelling-house, the 9-acre park field, and the 75 lots at \$10,300, cannot complain that he was not informed of enough to permit him to safeguard his interests. He was able in reply to send a detailed estimate of these properties to his brother. He was also definitely told on the 1st December, 1904, in Robert's letter, that the Adelaide street property deal was closed and \$2,000 paid. The executors had in fact received down to the 1st May, 1905, the sum of \$2,779.02, and there was \$452.53 in the bank, and they had paid out only \$1,287.94, but were liable for payments on mortgages and other things—the estate was in fact at a standstill till the appellant decided, on the 1st March, 1905, to renounce. He nowhere appears to have asked any questions as to his share in it, or whether it could be paid over, but made his bargain with the information I have mentioned before him.

If I am right in my conclusions, which, as I have said, agree with those of the learned trial Judge, the case narrows down to two things: first, the right of the appellant in regard to lot No. 2, included in the deed to Robert but not mentioned by the executors as part of his share and not noticed by the appellant when he signed the deed; and, second, the right of the appellant to judgment for his share of the amount found by the Surrogate Court Judge to be now in the hands of the executors.

Assuming perfect good faith on both sides, lot No. 2 was still an asset of the estate, and was conveyed by the executors to Robert without being actually mentioned as part thereof, when the appellant was communicated with on the subject. It was probably overlooked, or was thought to be so clearly a part of what was known as "the homestead" as to need no special mention. The appellant signed the deed, but was careless in not reading it. Both parties appear to have been to blame in the matter somewhat in an equal degree.

So far as the executors are concerned, they acted honestly I have no doubt. Did they act reasonably? To determine this, reference has to be made to the will to ascertain just what their duties were. They were trustees of the property which was vested in them, but the division of it was left entirely in the hands of the four brothers individually, and not in the hands of the executors, and the latter would have been bound to convey in pur-

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suance of any settlement arrived at by the four. They had no duty to divide or to take any part in the division.

The fundamental fact in all the cases cited to us is the actual fiduciary relationship. I can find none here, but only the relation of bare trustees, bound to divest themselves of the legal estate in the way determined by four brothers; and, although two of them are trustees, yet in that capacity they owed no duty to the others in the matter of division which brings them within the well-known principle of Equity so much relied on. But, if it can be said that their position is comparable to that of the trustees in *Denton v. Donner*, 23 Beav. 285, then I think that the respondents have discharged the onus there spoken of. I cannot, however, bring myself to believe that there existed here that true relationship the existence of which gives point and meaning to the rule laid down against purchases from *cestuis que trust*.

Assuming, however, that they were trustees in the matter, how does the matter stand? The communication of the division to the appellant was made by James; and, throughout, lot No. 2 is not mentioned as allotted to anybody; so that, when it was conveyed to Robert, it had not, so far as the appellant was concerned, been considered in the division. It appears to have been allotted to Robert on the understanding I have mentioned, and the only act which the executors had to do was to sign the deed. That was prepared by the solicitor of the estate, who sent it to the appellant with the remark that "the deeds explain themselves, as you will see on reading them over." It hardly lies in the mouth of the appellant to say that the executors did not act reasonably, where he failed to do what they asked him to do, viz., read the deeds. I cannot see how the executors can be made responsible for this undetected error, or that their failing to supervise more effectively their solicitor's work can be said to be, under the circumstances, unreasonable. They should be relieved from responsibility in any case, and the Statute of Limitations would be a bar so far as they are concerned. But, as the lot was conveyed to Robert, can he hold it and not account for its value?

He is one of the executors, and, as he got the lot as part of his share and has sold it and received the proceeds of its sale, he should, I think, account personally to the appellant for his share thereof, viz., \$175, if the Statute of Limitations is not also a bar

in his case. I think it is, and that there was no concealed fraud which prevents him from claiming the benefit of it.\*

Upon the other branch of the case, I feel myself unable to agree with the learned trial Judge. He struck out the claim for the recovery of the one quarter share of the amount found to be in the respondents' hands as executors. Some confusion occurred on the argument as to whether the learned Surrogate Court Judge had allowed the parties for all the payments made by them during the father's lifetime in order to preserve the property. It turns out that, although said not to be a debt of the estate, it was by the Surrogate Judge deducted from the amount found to be in the hands of those who made the payments, and so from the amount for which the executors are held to be chargeable. I think the evidence before the Surrogate Judge warranted this. The approval by that Judge was final and binding upon all the parties represented, except in so far as fraud or mistake may be shewn: *In re Wilson and Toronto General Trusts Corporation* (1908), 15 O.L.R. 596.

The proper practice would seem to allow the bringing of an action by the beneficiary upon the footing of these accounts just as if they were settled accounts, in case due payment is not made by the trustees, or the making of an application for an administration order if circumstances warrant the latter course instead of direct suit.

The result is that the judgment should be varied to the extent I have mentioned, and judgment should be entered for the appellant for the sum of \$1,256.03, being the one quarter, or his share, of the moneys in the hands of the executors, with such interest only as that amount has borne since it was paid into Court in this action, and less the costs hereinafter mentioned.

In view of the way in which the charges of fraud and improper dealing were persisted in, I think it would be fair to award no costs of the action to the appellant, and to allow to the respondents their costs as executors out of the estate down to the date of payment of the \$1,256.03 into Court, of which the share of the appellant will pay one quarter. The appellant should also pay

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\*See the provisions of the Limitations Act, R.S.O. 1914, ch. 75, relating to trusts and trustees, secs. 46, 47, and 48.

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the costs after date of payment into Court. No costs of appeal, as success is divided.

The case of *Bruty v. Edmundson*, [1917] 2 Ch. 285, [1918] 1 Ch. 112, indicates the extent to which the Court will go as to costs when a defendant trustee is unnecessarily attacked.

*Appeal allowed in part.*

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[MASTEN, J.]

# LYNCH-STAUNTON v. SOMERVILLE.

*Solicitor—Bill of Costs—Action to Recover Amount of—Solicitors Act, R.S.O. 1914, ch. 159, sec. 34—Services Rendered by Plaintiff in Capacity of Solicitor—Lump-sum Charged for Specific Items of Services—Non-compliance with Statute in Part of Bill only—Effect as to Whole—No Proper Bill Delivered—Action Prematurely Brought.*

The plaintiff, a barrister and solicitor, sued the defendants for the amount of a bill for services rendered. In the bill the services rendered by the plaintiff in his capacity of counsel were distinctly charged for; the bill also contained many items in respect of each of which a specific charge was made; and, in addition, certain items, Nos. 1 to 16, in respect of none of which a specific charge was made, but at the end of the bill there appeared the following: "Fee on negotiations as above set out and recovering property of the value of \$60,000 subject to a payment of \$30,000 . . . . \$700."—

*Held*, that although the services charged for, other than those rendered as counsel, might have been rendered by a barrister or a lay agent as well as by a solicitor, and none of them were services which were necessarily performed by a solicitor, the employment was referable to the plaintiff's character as a solicitor, and his claim in the action was subject to the provisions of the Solicitors Act, R.S.O. 1914, ch. 159.

*Re McBrady and O'Connor* (1899), 19 P.R. 37, 43, followed.

*Held*, also, that the bill rendered did not, in respect of the 16 items, comply with the provisions of sec. 34 of the Act; a bill upon which an action could be based had not been delivered; and the action was therefore prematurely brought.

*Gould v. Ferguson* (1913), 29 O.L.R. 161, and *Re Solicitor* (1917), 12 O.W.N. 191, followed.

ACTION by a gentleman practising as a barrister and solicitor to recover \$1,089.90 for services rendered.

The action was tried by MASTEN, J., without a jury, at a Hamilton sittings.

J. G. Farmer, K.C., for the plaintiff.

H. S. White, for the defendants.

June 19. MASTEN, J.:—The plaintiff's claim is for \$1,089.90 for legal services rendered, as appears by the special endorsement



on the writ of summons. In his affidavit indicating his defence, and filed pursuant to the Rules, the defendant Balfour says, among other statements:—

“I and my co-defendant say that no proper bill of fees, charges, and disbursements to the amount of the said sum of \$1,089.90 for the services rendered by the plaintiff pursuant to the said retainer, was, more than one month or at any time prior to the issue of the said writ of summons herein, delivered by the plaintiff to the defendants. I and my co-defendant are advised by our solicitors herein and believe that the failure of the plaintiff to deliver a proper bill as aforesaid constitutes a good defence to the plaintiff's action, and in this regard rely on the provisions of the statute commonly known as ‘The Solicitors Act,’ being chapter 159 of the Revised Statutes of Ontario 1914.

“A reference to the said bill referred to in the next preceding paragraph hereof will shew that it is made up of items treated generally speaking in two separate and distinct ways: (a) items covering interviews, conferences, attendances, and preparation of papers, for which details are given shewing the amounts charged for each individual service and for disbursements; (b) items covering interviews, conferences, and attendances, for which no details are given shewing the amounts charged for each individual service.

“With reference to the items referred to in sub-paragraph (b) of paragraph 9 hereof, for which no details are given shewing the amounts charged for each individual service, the said bill contains a lump charge of \$700, apparently intended to cover all of the said items. The defendants, without in any way waiving any of the objections hereinbefore set forth to the said bill as a whole, particularly rely on the provisions of the said Solicitors Act so far as the said items and the said lump charge of \$700 are concerned.”

The bill of costs rendered by the plaintiff, and upon which the action is founded, is filed as exhibit No. 1. In that bill there appear certain items, Nos. 1 to 16, in respect of which no charge is made against each particular item of service, but at the end of the bill there appears the following:—

“Fee on negotiations as above set out and recovering property of the value of \$60,000 subject to a payment of \$30,000 . . . \$700.”

The bill as rendered contains many other items in respect of which a specific charge is made on each occasion.

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The defendants stand on their strict rights, and contend, on the grounds above set out, that this action must be dismissed.

The plaintiff seeks to distinguish the present case from previous decisions on two grounds:—

The services in question might in their nature have been rendered either by a barrister or by a lay agent as well as by a solicitor; none of them are services which it was essential should be performed by a solicitor. While it is common ground that the plaintiff was, at the time when these services were rendered, a solicitor authorised to practise as such, yet it appears from the plaintiff's evidence, and is uncontradicted, that he did not in fact carry on in the ordinary manner the practice of his profession as solicitor; on the contrary, when it was determined by the clients (the present defendants) to issue a writ for the enforcement of their claim, the plaintiff insisted that the writ should be issued and the action should be conducted by some solicitor other than himself, he agreeing to afford assistance only as counsel. From a perusal of the bill rendered by the plaintiff (exhibit No. 1) it appears that the services rendered by the plaintiff in his capacity as counsel have been specifically charged for. I refer as examples to the following items:—

“Dec. 21. Long consultation with and attendances on Mr. William Somerville and Mr. St. Clair Balfour and advising as to Somerville's rights under an agreement of April, 1904, in 87-89-91 McNab street north, Hamilton, on the south-west corner of McNab and Vine streets, occupied by the Dominion Cannery, and taking instructions .....\$50.00.

“April 8. Attending on Mr. Counsell and revising statement of claim.....\$10.00.”

This makes it evident to me that in rendering the bill the plaintiff intended to make specific charges for the several services rendered by him in the capacity of counsel, and that the charge for negotiating the settlement has not been treated by the plaintiff as a counsel fee, but as a separate and distinct service rendered by him in some capacity other than counsel.

If then this service was not rendered by him in his capacity of a barrister, was it rendered in his professional capacity as a solicitor, or was it rendered as a lay agent?

Having regard to the whole evidence in this case and to the law

as laid down by Armour, C.J., in *Re McBrady and O'Connor* (1899), 19 P.R. 37, at p. 43, I think that it must be held that the employment was so connected with his professional character as to afford a presumption that his character as a solicitor formed the ground of his employment by the client.

My conclusion is, therefore, against the plaintiff on the first point, and I find that his claim in this action is subject to the provisions of the Solicitors Act.

Then, on the second ground: does the bill as rendered comply with the provisions of sec. 34\* of that Act?

Recognising as I do the convenience and desirability of the course here adopted, and fully realising that if an individual charge were extended in the bill of costs in question opposite to each of the 16 numbered items, it would be wholly artificial, and that the only way of fairly estimating the proper charge to be allowed for these 16 items is to consider the whole service as one, including the time spent, the amount involved, the skill displayed, and the success of the effort, I have tried to find some legitimate ground on which to distinguish this case from *Gould v. Ferguson* (1913), 29 O.L.R. 161, 14 D.L.R. 17, *Re Solicitor* (1917), 12 O.W.N. 191, and from the earlier cases which they follow, but regret that I have been unable to find any such ground of distinction.

If there were no other items in the bill except the 16 items here in question, there could be no doubt but that the case would be absolutely and literally on all fours with the cases I have just quoted. The fact that the services relate to one single subject-matter appears to make no difference, if the services extend intermittently over a period of time, and it plainly can make no difference that in this case the bill of costs contains other additional items of services in respect of which a specific charge is carried out.

\*34.—(1) No action shall be brought for the recovery of fees, charges or disbursements for business done by a solicitor as such until one month after a bill thereof, subscribed with the proper hand of such solicitor . . . has been delivered to the person to be charged therewith . . . or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill.

(2) In proving a compliance with this Act it shall not be necessary in the first instance to prove the contents of the bill delivered, sent or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements subscribed as required by sub-section 1, or enclosed in or accompanied by such letter, was so delivered, sent or left; but the other party may shew that the bill so delivered, sent or left, was not such a bill as constituted a compliance with this Act.

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The result is, that, no proper bill having been rendered, the action is prematurely brought, and must be dismissed, unless the plaintiff chooses to accept the sum of \$500 paid into Court by the defendants.

If the action is dismissed, it will be expressed to be without prejudice to any other action which the plaintiff may choose to bring 30 days after delivery of such a bill as the practice demands.

Costs must follow the result.

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[IN CHAMBERS.]

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RE HEWITT AND HEWITT.

*Insurance (Life)—Change of Beneficiary—Preferred Class—Declaration in Writing—Sufficiency—Insurance Act, sec. 171 (5)—“Soldier’s Will”—Printed Form—“Personal Estate”—Inclusion of “Insurance Policy”—Effect of Printed Explanatory Clause—Policy Payable in Ontario—Assured Domiciled in British Columbia—Application of Law of Ontario.*

In 1904, R., then domiciled in Manitoba, insured his life for \$2,000 in an insurance company, having its head office in Ontario. The loss was payable at the company’s head office, to R.’s mother, who was domiciled in Ontario. In 1906, R. went to live in British Columbia and became domiciled there. In 1915, he enlisted in the Canadian Expeditionary Force, and went overseas in January, 1917, having married in June, 1916. Before leaving for overseas, he executed a “soldier’s will” upon a printed form, and thereby bequeathed all his personal estate to his wife. By a clause printed as part of the will, above the testimonium clause, it was declared that “personal estate” included “insurance policy.” R. was killed in action in November, 1917. The \$2,000 insurance moneys were claimed by his mother and by his widow:—

*Held*, following *Re Monkman and Canadian Order of Chosen Friends* (1918), 42 O.L.R. 363, that under the law of Ontario (the Insurance Act, R.S.O. 1914, ch. 183, sec. 171 (5)) the will was sufficient to change the beneficiary from the mother to the wife.

*And held*, adopting the view of some of the Judges in *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, that the power exercised by R. was, or was analagous to, a power of appointment, and was governed not by the law of his domicile (British Columbia), but by the law of Ontario.

*Held*, therefore, that the widow was entitled to the moneys.

MOTION on behalf of Sarah Hewitt for an order declaring her entitled to the insurance moneys payable under a policy of insurance issued by the Crown Life Insurance Company upon the life of James T. Hewitt, the applicant’s son, who was killed in battle.

The moneys were also claimed by Gwendoline E. Hewitt, the widow of the deceased.

The following statement of facts was agreed upon by counsel for the two claimants respectively:—

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1. The deceased, while a resident of and domiciled in Winnipeg, Manitoba, took out an insurance policy for \$2,000 in the Crown Life Insurance Company, a corporation having its head office in Toronto. The policy bears date the 7th November, 1904, and is number 12607. By the said policy the loss is payable to the assured's mother, Sarah Hewitt, who for the past 30 years has resided in Toronto. The said policy is exhibit 1 hereto.

2. The deceased was married in Winnipeg, in or about the year 1905, and his then wife died in Vancouver, B.C., in or about the year 1912.

3. The deceased, after having lived in Winnipeg until the year 1906, moved to and became domiciled in British Columbia, where he remained domiciled until his death.

4. While a resident of and domiciled in British Columbia, the deceased enlisted in the British Expeditionary Forces, such enlistment having taken place in August, 1915. Subsequent to his enlistment, namely, in June, 1916, the deceased married Gwendoline Emily Neat, at the city of Vancouver, British Columbia, and she is now his widow.

5. Before leaving for Overseas, namely, on the 17th January, 1917, the deceased made his will on a printed form furnished by the Dominion Government, a copy of the said will being attached hereto, as exhibit 2. The said will, so far as is known, was never revoked or altered by any written instrument.

6. During the whole of the past many years, including the period when the deceased was a widower, he regularly sent money to his mother, who actually held the said policy of insurance, and his said mother paid several premiums on the said policy, amounting to about \$112.50.

7. The deceased was killed in action in France on the 11th November, 1917.

8. On the 23rd October, 1917, while at the front in France, the deceased wrote his widow, the said Gwendoline Emily Neat, the letter marked exhibit 3 hereto.

9. On the 13th November, 1917, being 2 days prior to the deceased's death, his mother, the said Sarah Hewitt, received by mail from the said James T. Hewitt a letter dated the 23rd October, 1917, marked exhibit 4 hereto.

10. The policy of insurance in question herein was the only policy of life insurance carried by the said deceased.

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11. The mother of the deceased is a widow, aged about 73 years.

12. The Crown Life Insurance Company has consented to pay the moneys due under said policy of insurance to whichever of the claimants may be declared entitled thereto.

In the letters referred to, the deceased James T. Hewitt intimated an intention of changing the beneficiary of the policy, substituting his wife for his mother.

The will was on a printed form, the blanks being filled up in writing. The will as it stood when executed was as follows, the words written in being italicised for convenience:—

Form of Will.

I, *James Thomas Hewitt* (Name in full) Regimental Number \_\_\_\_\_ serving in *173rd Battalion* of the Canadian Expeditionary Force, do hereby revoke all former Wills by me made and declare this to be my last Will.

I bequeath all my real estate unto

<i>Gwendoline Emily Neat Hewitt</i>	}	Name and address
<i>Suite 19 Mt. Crown Block</i>		of person or
<i>North Vancouver B.C.</i>		persons to whom it is to go.

absolutely, and my personal estate I bequeath to

<i>Gwendoline Emily Neat Hewitt</i>	}	Name and address of person
<i>Suite 19 Mt. Crown Block</i>		or persons to receive
<i>North Vancouver B.C.</i>		personal estate*
		(See note).

Important Note this *17th* day of *January* A.D. *1917*.

This must be signed and

dated by the soldier *James T. Hewitt* Signature of soldier.  
himself.

\*N.B.—Personal estate includes pay, effects, money in bank, insurance policy, in fact everything except real estate.

Signed and acknowledged by the Testator as and for his last Will in the presence of us both present at the same time, who in his presence, at his request, and in the presence of each other have hereunto subscribed our names as Witnesses.

	Signature of First Witness <i>J. M. Reid,</i>
The two	Address of Witness <i>1306 Carders St. Vancouver, B.C.</i>
witnesses	Occupation of Witness <i>soldier</i>
must	Signature of Second Witness <i>Leonard Sydney McGill</i>
sign here	Address of Witness <i>763 Twelfth Avenue East,</i> <i>Vancouver, B.C.</i>
	Occupation of Witness <i>Military officer.</i>



The question was, whether the change of beneficiary was validly effected.

June 10. The motion was heard by LATCHFORD, J., in Chambers.

A. R. Hassard, for the applicant.

R. H. Parmenter, for the widow of the assured.

June 25. LATCHFORD, J.:—It is conceded that unless this case can be distinguished from *Re Monkman and Canadian Order of Chosen Friends* (1918), 42 O.L.R. 363, the claimant, as the beneficiary named in the policy, must fail.

The assured, a soldier on active service, bequeathed to his wife, the respondent, all his personal estate, using the "Form of Will" adopted officially, and, it must be said, stupidly, for the use of members of the Canadian Expeditionary Forces.

The policy is declared to be payable at the head office of the insurers, in Toronto, and was effected while the assured was a resident in Manitoba. By R.S.M. ch. 98, sec. 47, a policy issued by an insurance company registered in that Province, as this company doubtless was, shall be payable in that Province, "when the assured resides therein." The assured, however, was not residing in Manitoba when the policy became payable; and I do not think the law of Manitoba has any application to the case. The assured, when he made his will, and when he was killed in action in France, undoubtedly resided and had his domicile in British Columbia.

The law of the domicile governs, it is contended; and the change in the designation is by that law ineffective.

The British Columbia statute of 1911, ch. 115, sec. 8, follows verbatim the wording of sec. 160 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 160, until nearly the end of the section. The portion omitted is not material here. The law of British Columbia as to the requisites necessary when a change in the designation of beneficiaries is made is the same as the law of Ontario was when *In re Cochrane* (1908), 16 O.L.R. 328, and *Re Earl* (1910), 10 O.W.N. 1141, 16 O.W.R. 901, were decided. No amendment corresponding to 2 Geo. V. ch. 33, sec. 171 (5), now R.S.O. 1914, ch. 183, sec. 171 (5),\* was ever enacted in British

\*171.—(5) Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there

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Columbia. Accordingly it is argued that the decisions of our Courts based upon the amendments of 1912 do not apply, and that, as in such cases as *In re Cochrane*, the policy must be "identified by number or otherwise."

This argument is, I think, unanswerable if the law of British Columbia govern the case. But, in my opinion, the law of that Province does not apply. I adopt the principles stated by Middleton, J., in *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, at p. 32, approved in the judgments of Riddell and Masten, JJ., in the same case. The power which the testator exercised is, or is analogous to, a power of appointment, and is governed, not by the law of the Province in which he resided, but by the law of this Province, and the will was effective to substitute the testator's wife for his mother as the person entitled to benefit by the policy.

The case is one in which the costs of each party, fixed at \$25, may be paid out of the fund.

exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration.

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[IN CHAMBERS.]

June 25.

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*Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Motion to Quash—Objection not Taken in Notice of Motion—Judicature Act, sec. 63 (2)—Leave to Serve Supplemental Notice—Service after Expiry of 30 Days—Temperance Act, sec. 102 (2)—Amendment of Original Notice—Evidence to Support Conviction—Intoxicating Liquor Found in Defendant's Possession—Presumption—Sec. 88—Onus—Question for Magistrate—Review of Finding—Offence Insufficiently Described in Conviction—Amendment under sec. 101—Presumption from Possession—Secs. 85, 88—Failure to Rebut—Suspicious Circumstances.*

A motion to quash a magistrate's conviction of the defendant for an offence against sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, was based upon the ground that there was no evidence to support it; but on the return, another objection, not taken in the notice of motion, was raised. Section 63 (2) of the Judicature Act provides that "the notice shall specify the objections intended to be raised." The defendant was allowed to serve a supplemental notice, the original motion being retained:—

*Held*, that the supplemental notice was not a new notice of motion; that a notice of motion to quash was served within the 30 days prescribed by sec. 102 (2) of the Ontario Temperance Act (added by sec. 33 of the Ontario Temperance Amendment Act, 1917, 7 Geo. V. ch. 50); and that it was competent for the Judge before whom the original motion came to permit the defendant to amend his notice so as to specify the particular objection, notwithstanding the lapse of 30 days from the date of the conviction.

The motion was, therefore, entertained upon both grounds taken.

*Held*, as to the first ground, that, intoxicating liquor having been found in the defendant's possession, sec. 88 of the principal Act compelled the defendant to prove that he did not commit the offence of having or keeping liquor contrary to the provisions of the Act; whether the evidence which the defendant adduced was sufficient to satisfy this onus was a question for the magistrate; and his finding should not be reviewed.

*Held*, upon the second ground, that the conviction was bad as insufficiently describing the offence, but should be amended under sec. 101 of the Act. The evidence of the defendant's possession of liquor was undisputed, and the presumption created by secs. 85 and 88 was not rebutted by the evidence—the circumstances attending the defendant's possession being such as to raise a strong case of suspicion against the plaintiff's statement that, when the liquor was found in his possession, he was transporting it from a place in the Province of Quebec where it might lawfully be purchased to places in Ontario where it might lawfully be kept, viz., his own house and the house of a neighbour.

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MOTION to quash a conviction of the defendant, by the Police Magistrate in and for the Town of Alexandria, who was also a Justice of Peace in and for the United Counties of Stormont Dundas and Glengarry, for that the defendant, on the 21st day of March, 1918, at the Township of Lancaster, in the County of Glengarry, unlawfully did keep liquor in contravention of the Ontario Temperance Act.

Section 41 (1) of the Act, 6 Geo. V. ch. 50, is as follows:—

“Except as provided by this Act, no person, by himself, his clerk, servant or agent, shall have or keep or give liquor in any place wheresoever, other than in the private dwelling-house in which he resides, without having first obtained a license under this Act authorising him so to do, and then only as authorised by such license.”

June 4 and 25. The motion was heard by MASTEN, J., in Chambers.

*Grayson Smith*, for the defendant.

*J. R. Cartwright*, K.C., for the Crown.

June 25. MASTEN, J.:—This motion was first argued before me on the 4th June instant. At that date, an objection was taken that the conviction was bad because it did not specify what offence had been committed under the Act. To this point Mr. Cartwright raised the preliminary objection that the point was not specified in the notice of motion, and that, by sec. 63, sub-sec. 2, of the Judicature Act, it is provided that “the notice shall specify the objections intended to be raised.”



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In view of this objection, I gave the defendant leave to serve a supplemental notice returnable before me, and meantime retained the motion, and to-day the motion came on for further argument, notice having been served raising the point above mentioned. To this point Mr. Cartwright now raises a preliminary objection, viz., that the notice now served is a new notice, and, the conviction having been made on the 22nd April last, the new notice of the 4th June was not competent, having regard to sec. 102, sub-sec. (2), of the Ontario Temperance Act—a sub-section added by sec. 33 of the Ontario Temperance Amendment Act, 1917, 7 Geo. V. ch. 50, as follows:—

“No motion to quash a conviction or order made under this Act shall be heard by the Court of Judge to which such application is made unless notice of such motion has been served within 30 days from the date of the conviction or order.”

Upon consideration of the preliminary objection, I am of opinion that the supplemental notice which has been recently served is not a new notice of motion, that a notice of motion to quash was served within the 30 days prescribed by the Act, and that it was competent for the Court to permit the applicant to amend his notice so as to specify the particular objection now sought to be raised, notwithstanding the lapse of 30 days. I therefore overrule the preliminary objection, and entertain the motion on all the grounds raised.

By the notice of motion as originally drawn, the defendant seeks to have the conviction quashed on the ground that there is no evidence to support it. It is conceded that liquor was found in the defendant's possession. This raises a *prima facie* case against him, and thereupon sec. 88\* of the principal Act compels the defendant to prove that he did not commit the offence of having or keeping liquor contrary to the provisions of the Act. Whether the evidence which he adduced was sufficient to satisfy this onus was a question for the magistrate, and I am bound by his finding. This ground is therefore disallowed.

\*88. If, in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or keeping or having or purchasing or receiving of liquor, *prima facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted, then unless such person prove that he did not commit the offence with which he is so charged he may be convicted accordingly.

On the ground specified in the supplementary notice, the conclusion at which I have arrived is, that the conviction is bad as insufficiently describing the offence. The conviction follows the information, and the whole record of proceedings looks very much as if neither the prosecutor nor the magistrate knew what the offence was for which the defendant was being convicted. In the administration of this drastic Act it is most important that all steps in the prosecution should be taken with technical precision so that the defendant may have the fullest opportunity of making his defence.

As I hold the conviction bad, the next question that arises is, whether, having regard to the provisions of sec. 101\*, I ought to amend the conviction. It seems to me that, in considering that question, I am not bound by the magistrate's conviction, but that I ought to consider *de novo* the whole evidence, in order to form my own opinion as to whether or not there is evidence to prove some offence under the Act, though no doubt, in so doing, the view entertained by the magistrate is an element for consideration.

On behalf of the defendant it is contended that the evidence shews that the liquor in question was being transported from a place in the Province of Quebec where it might lawfully be purchased to a place in the Province of Ontario where it might lawfully be kept, to wit, the residences of the defendant and of one Jodoin, who was with him.

Having regard to the presumptions prescribed by secs. 88 and 85 of the Act, it was essential, in this aspect, that the defendant should clearly establish to my satisfaction that he was not keeping liquor elsewhere than in his private residence contrary to the provisions of sec. 41 of the Act. His denial to the constable that he had any liquor in his sleigh, the fact that an unsealed bottle of the liquor was found only partly full, the fact that Jodoin, who was with the defendant in his sleigh, was under the influence of

\*101. No conviction . . . under this Act shall be held insufficient or invalid by reason of any variance between the information and the conviction or by reason of the punishment imposed or the conviction or order made being in excess of that which might lawfully have been imposed or made or by reason of any other defect in form or substance, provided it can be understood from such conviction, warrant, process or proceeding that the same was made for an offence against some provision of this Act within the jurisdiction of the magistrate . . . and provided there be evidence to prove some offence under this Act, and where necessary, every such conviction . . . may be amended in such manner as justice may require.

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liquor, the fact that two of the parcels found in the sleigh were consigned to fictitious consignees—all tend to raise against the defendant's story a strong case of suspicion.

The evidence of his possession of liquor being undisputed, I am governed by the presumption created by secs. 88 and 85\*, unless the evidence satisfies my mind that the presumption has been rebutted; and, for the reasons I have indicated above, my mind is not so satisfied by the evidence adduced. I think there is some evidence of an offence under sec. 41 of the Act. I therefore direct that the necessary amendment to the conviction be made, and I refuse the motion to quash. To mark my disapprobation of the vague character of the proceedings, I direct, in the exercise of my discretion, that the dismissal be without costs.

*Order accordingly.*

\*85. The burden of proving the right to have or keep or sell or give liquor shall be on the person accused of improperly or unlawfully having or keeping or selling or giving such liquor.

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[ROSE, J.]

July 5.

### McMAHON v. KIELY SMITH & AMOS.

*Contract—Brokers—Members of Stock Exchange—Sale of Customer's Shares to another Member—Future Delivery—Sale not Made on Exchange—Failure of Purchaser to Pay for Shares—Obligation of Brokers—Breach of Contract—Adoption—Release—Action by Customer against Brokers—Assessment of Damages—Rules of Exchange—Judgment—Provisions for Benefit of Defendants in Case of Payment by Purchaser.*

The plaintiff, being the owner of certain "pooled" shares of the capital stock of a mining company, instructed the defendants, who were brokers and members of an Exchange, to sell the shares at 55 or better, "seller's option 60 days or delivery 60 days." They sold them, at 60, to a broker, a member of the same Exchange; but the sale was not made upon the Exchange, and could not be recorded as an Exchange transaction. The purchaser paid for a portion of the shares and had delivery of a portion, but was in default as to the balance:—

*Held*, that the obligation of the defendants was to make the sale on the Exchange, and subject to the rules of the Exchange.

*Queensland Investment and Land Co. Limited v. O'Connell and Palmer* (1896), 12 Times L.R. 502, and *Forget v. Baxter*, [1900] A.C. 467, 479, followed.

Upon the evidence, the plaintiff had not so adopted the defendants' action as to release whatever claim he had against them.

The plaintiff was, therefore, entitled to recover whatever actual damage he could shew that he had sustained as a result of the defendants' breach of contract.



Having regard to the rules of the Exchange "governing clearing-house in respect of time contracts," which would have applied if the sale has been made on the Exchange, the plaintiff's damages should be assessed at \$750, being 25 per cent. of the purchase-price of the shares, the obligation of the buyer being to deliver to the manager of the clearing-house, on the third clearing day after the contract, a marked cheque for 25 per cent. of the purchase-price, for the security of the seller. That much the purchaser would doubtless have done; but what would or might have happened after that as to putting up margins or the sale of the purchaser's seat on the Exchange was too uncertain to form a basis for an assessment. Judgment was directed to be entered for the plaintiff for \$750, with provisions for the benefit of the defendants, in case they succeeded in getting for the purchaser the whole or part of the balance of the purchase-price.

AN action to recover \$1,469.40, the balance alleged to be due upon a sale by the defendants (brokers) for the plaintiff of certain shares of the capital stock of a mining company.

The action was tried by ROSE, J., without a jury, at Haileybury and Toronto.

*J. M. Ferguson*, for the plaintiff.

*Hamilton Cassels*, K.C., for the defendants.

July 5. ROSE, J.:—The plaintiff, being the owner of certain "pooled" shares, which he would not be able to deliver until the opening of the pool, instructed the defendants, who are members of the Standard Stock and Mining Exchange, to sell the shares at 55 or better, "seller's option 60 days or delivery 60 days." The defendants sold the shares, at 60, to a broker, a member of the same Exchange; but the sale was not made upon the Exchange, and, so, could not be recorded as a Stock-exchange transaction. The purchaser has paid for 2,050 of the shares, and has had delivery of 2,000 of them, but is in default as to the balance, and, apparently, is not in a position financially to pay the balance, at least at present.

The plaintiff's case is that the obligation of the defendants was to make the sale on the Exchange, and subject to the rules of the Exchange; that, if they had performed their duty there would have been security for the payment of the price; and that the defendants, therefore, are liable to him for the unpaid balance.

I think that the contract between the plaintiff and the defendants was as the plaintiff states it: *Queensland Investment and Land Co. Limited v. O'Connell and Palmer* (1896), 12 Times L.R. 502; *Forget v. Baxter*, [1900] A.C. 467, 479. The evidence, in my

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opinion, falls short of establishing an adoption by the plaintiff of the defendants' action, in any such sense as involves a release of whatever claim he would otherwise have against them. I think, therefore, that the plaintiff is entitled to recover whatever actual damage he can shew that he has sustained as a result of the defendants' breach of contract; the difficulty is in estimating that damage.

By the rules of the Exchange "governing clearing-house in respect of time contracts," which would have applied if the sale had been made on the Exchange, the buyer must, on the third clearing day after the contract is made ("clearing days" are all days except Saturdays and holidays), deliver to the manager of the clearing-house a marked cheque for 25 per cent. of the purchase-price. This is for the security of the seller; and, whenever the market price of the stock shall change so as to reduce the seller's margin to 15 per cent., the seller may call upon the buyer to deposit an additional 10 per cent. This may be repeated as often as the margin is reduced by 10 per cent. of the contract price. The by-laws of the Exchange also provide machinery for the sale of the seat of any member who makes default in the performance of obligations entered into on the Exchange, and for the division of the proceeds of the sale *pro ratâ* amongst the members to whom he may be indebted in respect of such obligations. The plaintiff suggests that, if the sale of the shares had been made in the regular manner, the "margins" would have been available for his protection, or, if they had not been put up, the purchaser's seat could have been sold, and so the plaintiff would have been sure of his money.

If he is right in that, his damage is the difference between what he has received and what the purchaser agreed to pay; but it is not clear that he is wholly right. It was suggested at the trial (see exhibit 5)—but not proved—that the purchaser bought in good faith and expecting to pay, and that his failure to pay was attributable to the fact that the customer for whom he was acting left him in the lurch. If he was acting in good faith, as it seems fair to assume he was, I think it may be taken for granted that he would have been willing to do such formal acts as would have resulted in the entry of the sale as a Stock-exchange transaction; and, if he had done that, there is little doubt that he would have deposited the cheque for the 25 per cent.—\$750. But it is not so

certain that he would have come forward, upon demand, with additional margins, when the stock made its successive drops in price. One cannot tell what he would have done. He does not seem to have been able to make very large payments; the defendants, certainly, did not think they could get money from him any faster than they did get it; and whatever cause operated to prevent his paying for the stock might have been effective to prevent his putting up the margins, even if he had been threatened with the loss of his seat. Whether the plaintiff would have been better off than he now is if there had been an early default on the part of the purchaser to put up a margin, and if an effort had been made to resell the shares, is also uncertain. Sales of shares of the same stock were made from time to time, but they were sales for immediate delivery; and, apart from such inference as can be drawn from the fact that the sale in question was made, and that it was made at a price below the market price of shares sold on the same day for immediate delivery, there is no evidence of any market for shares offered for future delivery. Moreover, the question as to what would have resulted from an attempt to sell the seat is one that cannot be answered upon the evidence presented: no one gave any information as to what the seat would have brought, or as to what the purchaser's obligations were to the Exchange or to other brokers; so that, even if it is assumed that the seat was of considerable value, it cannot be said that the proceeds of its sale would have formed a fund sufficient to pay a substantial dividend to each of the purchaser's creditors.

In the face of all this uncertainty, it seems impossible to assess the damages at anything like the amount claimed by the plaintiff; but it seems reasonably certain that he has lost something, and I think it is a fair inference from the evidence that he has lost not less than the equivalent of the 25 per cent. of the purchase-price which ought to have been put up as an initial deposit. Mr. Cassels points out that the plaintiff has already received more than that amount by way of payments. That is true; but it does not seem likely that the fact that he had made a deposit would have deterred the purchaser from making payments on account, if he was at all able to do so. The probability seems to be the other way. If he had had some money up as security, that would have been an additional incentive to him to try to carry out his contract. I quite realise

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that there is no right to make a "guess" the basis of an assessment of damages; but I do not think that an assessment at \$750 can rightly be called a guess; it appears to me that it is a fair inference from all the evidence that the plaintiff's loss is at least that much; but, when you get beyond \$750, so many elements of uncertainty enter into the calculation that it becomes a mere matter of conjecture. I think, therefore, that no more can be awarded.

Mr. Ferguson suggested on the argument, which was had in Toronto, several weeks after the taking of the evidence, that, if he was given a reference, he might be able to shew that a sale of the seat would have produced a considerable sum for his client; but the evidence at the trial was intended to be complete, both as to the existence of the liability and as to its amount; and in arriving at the sum mentioned I have tried to give to all the evidence such weight as seems reasonable, and it would not appear to me to be fair to re-open the matter now.

There will be judgment in favour of the plaintiff for \$750 and costs. If the defendants desire it, the judgment may contain provisions for the benefit of the defendants, in case they succeed in getting from the purchaser the whole or some part of the balance of the purchase-price. When, if ever, it happens that the sums received by the plaintiff, including the damages, amount to the purchase-price, with interest from the time when payment ought to have been made, any further sums paid by the purchaser ought to go to the defendants.

[APPELLATE DIVISION.]

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FAIRWEATHER v. McCULLOUGH.

April 25.  
May 2.  
July 15.

*Husband and Wife—Security Given by Wife at Instance of Husband for Liability of Husband to Employers—Consideration—Stifling Prosecution—Executed Transaction—Failure to Give Affirmative Proof of Pressure or Undue Influence—Action to Set aside Security—Findings of Fact of Trial Judge—Appeal.*

The plaintiff's husband, who sold hay for the defendants and made collections of money, was or appeared to be in default to them in respect of his collections to the extent of \$696. Being in fear of criminal prosecution and of losing his employment, he informed the plaintiff of the situation, and asked her to give a chattel mortgage upon her furniture to secure the \$696. This she did; the husband was not arrested and was continued in his employment. After his death, she brought this action to have the chattel mortgage set aside:—

*Held*, that the transaction being executed, it was necessary, in order to obtain relief in equity, that the plaintiff should shew more than that it was illegal: she must shew either pressure or undue influence; and the findings of the trial Judge that the plaintiff was a free agent in the transaction, that there was no agreement that, in consideration of the giving of the mortgage, the defendants would not prosecute her husband, that she appreciated what the giving of the mortgage meant, and that she had failed to shew affirmatively that the defendants procured her to execute the mortgage through pressure or undue influence, were supported by the evidence, and were sufficient to warrant the dismissal of the action.

*Wood v. Adams* (1905), 10 O.L.R. 631, 637, 638, and *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, 182, referred to. Judgment of MASTEN, J., affirmed.

ACTION for a declaration that a chattel mortgage made by the plaintiff in favour of the defendants was invalid, and for consequent relief.

April 24. The action was tried by MASTEN, J., without a jury, at a Toronto sittings.

*Gideon Grant* and *L. C. Smith*, for the plaintiff.

*D. O. Cameron*, for the defendants.

April 25. MASTEN, J. (orally):—The plaintiff is the widow of Arthur W. Fairweather, who died in the city of Toronto on or about the 17th January, 1917. The defendants are hay-merchants, carrying on business in the city of Toronto.

Prior to the 9th October, 1916, Arthur W. Fairweather was employed by the defendants as a salesman of hay in the city of Toronto, and it further appears from the evidence that he also made collections from the customers of his employers. In August,

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1916, difficulties appeared. On the one hand, the plaintiff alleges that at that date her late husband was liable to arrest on account of having received moneys, or, rather, of having stolen moneys, to express it in strict form. The defendants, on the other hand, allege that, at that date, while there was a shortage of \$696 in connection with hay supplied to customers through the agency of Fairweather, and for which they were unable to obtain the price, yet in their view at the present time that deficit arose from carelessness, bad management, and lack of records kept by Fairweather in connection with his transaction of the business for them, and that it was in consequence of these things, and not of any criminal act on his part, that the resulting loss had arisen to them. They said that they did not then and do not now think Fairweather had been guilty of theft. I should note, however, at that point, that it does clearly appear that one customer had telephoned them that an account which Fairweather asserted was still outstanding had actually been paid. That was the telephone communication received by McCullough & Muir from their customer. Whether payment had or had not been made to Fairweather by this customer has not been established. Nor does it appear, if the amount of this account was received by Fairweather, whether the money so received was or was not handed over on some other account to the defendants. But there was at that time a considerable sum which the defendants ought to have received in connection with hay supplied by them to customers through the agency of Fairweather, regarding which he could give no satisfactory account, either as to what part had been received by him, or by whom the balance, if any, was owing. This being the situation in August, the matter was discussed between him and the defendant Muir, and Muir made his rounds with him when he was visiting his customers, and some small sums were obtained in this way. But, the matter being discussed between Muir and McCullough, McCullough gave directions that the employment of Fairweather should at once be stopped, that he should no longer have the privilege of selling hay for the firm, or of collecting any moneys, until the difficulties which I have already referred to had been adjusted. That, according to my recollection of the evidence, took place on the 9th August. The effect of the testimony, as I understand it, is this, that Fairweather said no-



thing to his wife on the 9th or up till the 11th; that circumstance is not stated in so many words by any witness, but the wife says the first she heard of the matter was on the 11th August, 1916. She was at that time living at Balmy Beach with her mother. The flat which she and her husband had occupied in Parkdale was locked up, and they were boarding with the wife's parents.

On that day, she says, her husband called her up about noon and asked her to come into town, saying that he would meet her at the corner of King and Yonge streets. She says he did meet her, and they went out to Parkdale, and in the course of conversation she learned the source of his difficulties and worries, and he told her: "I am in trouble with my account with McCullough & Muir; they are going to arrest me." She says this was dragged out of him, piece by piece. She says they went up as far as Sunnyside, and walked back to the apartment, and he asked her, as the result of their conversation, to put up her furniture as security, saying, "They are going to arrest me if I do not give security." Of course there were only the two of them together, the husband and the wife; and, the husband being dead, this statement made by him to her cannot in the nature of things be corroborated or contradicted by any one; it is obvious, therefore, that no contradiction could be expected, or any further light be thrown upon it than by her statement, but I have no reason to doubt that the statement was so made by Fairweather to his wife.

In the apartment they met, after considerable delay, Mr. Kirkpatrick, the solicitor, and the two defendants. I pause here to refer to the position of Mr. Kirkpatrick: he was the solicitor, the customary solicitor, for the defendants. The account given of the transaction in the evidence is that in this particular case Fairweather said to McCullough & Muir that he was desirous of giving security in order that he might have an opportunity of getting in this money and straightening up the difficulties. And, after the three of them had visited the apartment, during the morning of the 11th, Mr. Fairweather asked the two defendants, McCullough and Muir, for the name of a lawyer, and they, naturally enough, gave him the name of Mr. Kirkpatrick, who was their customary adviser. In that way Mr. Kirkpatrick came into the transaction, and drafted the mortgage for Fairweather. Fair-

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weather had the mortgage with him, or Kirkpatrick brought it there, I am not sure which, and the particulars of the furniture which was to be covered by the chattel mortgage were filled in, and they were there for some time. There is no assumption in any way on the part of anybody that Kirkpatrick was acting for the plaintiff, Mrs. Fairweather. She made it perfectly plain that she was there without advice, and she suggested that perhaps she ought to have an opportunity of further consideration and advice. I take it that that was a matter of some importance. I refer to it at this juncture only for the purpose of making clear the position, that Kirkpatrick was not in any way assuming to act for Mrs. Fairweather, and did not assume to owe any duty or obligation to her; his only duty or obligation was, I take it, a joint duty and obligation. He himself assumed that he was acting for McCullough & Muir, at the expense of Fairweather, on Fairweather's instructions. That was his testimony, but he was in no sense acting for Mrs. Fairweather. Then, on Mrs. Fairweather's suggestion that she ought, perhaps, to have a lawyer, Mr. McCullough said that there had been too much time wasted, and no further time ought to be allowed.

It is perfectly plain to my mind, and I so find on the evidence, that Mrs. Fairweather did understand the transaction at the time she signed the mortgage. She knew perfectly well what a mortgage was; she knew her goods were being pledged to secure a debt which she did not owe, and in respect to which the obligation was wholly that of her husband. I think she was entirely competent to understand, and did understand fully, the nature of the transaction.

The document was then signed. I should record the fact that it appears that Mrs. Fairweather desired that her husband should be continued in his employment as a salesman for the defendants' firm. It will be borne in mind that he had been at that time deprived of his employment. The evidence further shews that he was specially experienced in this business of selling hay; no doubt he had a line of customers around the city whom he was able to visit, and the opportunities for employment as a salesman in that particular line of business are said to be not at all extensive. It was perfectly natural, therefore, that Mrs. Fairweather should desire that he be retained in his employment, and also it was

perfectly natural that the defendants should desire to retain him, because I have no doubt they were honest in their statement that they thought some part of this money was still owing to them from various people, and the only way in which they would follow up the business and succeed in making collections would be with the aid of Fairweather himself, and, consequently, it was to the mutual advantage of both that he should be continued in his employment. That was stipulated for by Mrs. Fairweather, and I find it as a fact; she was unable to say that it was not, and others say it was done. It is corroborated by the fact that subsequently a written document covering such appointment was signed.

Then, subsequently, and in October, Mrs. Fairweather paid the interest on the loan. My recollection of the testimony is that she got the money from her husband to do that, but she insisted on making the payment, in order to see that the interest (\$7) was actually paid; and no complaint appears to have been made at that time in regard to the mortgage, or in regard to the fact that it was an unrighteous transaction, or one that ought to be set aside. Neither was any complaint made at any time afterwards until in or about the end of 1917, when the defendants proposed to realise upon their security; then, for the first time, this claim was made.

In the meantime, however, in October, 1916, and afterwards in May, 1917, Mrs. Walker (the plaintiff's mother) had communication with Mr. Muir. The substantial part of what she says is that she considered it to be a curious sort of justice "if a firm and their lawyer can take a little, inexperienced girl, and back her up against the wall, so to speak, and say, 'Your husband owes nearly \$700, and unless you give us a mortgage on your wedding presents we are going to arrest him and put him in gaol.'" She says Mr. Muir said to her over the telephone: "Well, Mrs. Walker, it may look like that to you, but we certainly wish we had never taken the mortgage; we wish we had arrested him as we first intended to, and as Mr. McCullough would have done at the first if I had not asked for a little time." That testimony, being tendered, was objected to by Mr. Cameron; and, in my view, as tendered, and at that stage of the trial, was not admissible, because it was an attempt to give the view entertained

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at a later stage by Muir. The evidence was admitted, subject to objection, and I retain the view which I entertained at the time, that, at that point in the trial, it was not admissible evidence.

The evidence of the father, Mr. Walker, was to the effect that he had an interview with Mr. McCullough in May, 1917, in which he said that his daughter had no business to be dragged into the business at all, that she had nothing to do with it; that McCullough said, "Well, perhaps not," but he would see Muir about it, and afterwards he said, "If she had not come to his rescue we would have arrested him," referring to Fairweather. Now, had that evidence been tendered in reply to the statement made by McCullough and Muir that they never had any idea of arresting him, I think it would have been admissible in reply, strictly. The evidence is on the record now, and I think perhaps may be referred to, and I merely mention this fact parenthetically, because it may be of value in case of an appeal in this case.

Now, coming to the findings of fact respectively asked for by Mr. Grant and Mr. Cameron, some of them have already been covered by what I have said. It was sworn to by the plaintiff in her testimony that, in the course of the discussion at the flat, she said, "If I do not sign the document, what will happen?" Or, as I have noted it, "I don't know what to do, what if I don't?" And the answer was, "It all depends on how much you think of your husband." I do not know that that answer is entirely relevant, but I find that that conversation did take place. I find that the plaintiff did desire or suggest that she ought to have more time, or an opportunity of consulting counsel; I would not put it as strongly as that she actually asked for it, but she suggested that that should be done, and she was put off, and no opportunity was afforded her, and she was urged to sign at once. That is as far as I find definitely in respect to the findings asked for by Mr. Grant. I find that there was no discussion at the meeting in the apartment as to an actual prosecution, neither was there any agreement to stifle a prosecution at that time. The transaction was colourless as far as stifling a prosecution was concerned. The emphasis appears to have been laid entirely on other phases of the matter.

I have not dealt fully or specifically with the phase of the matter relating to duress, because I am going to reserve that point. I

shall deal with the other points in the case now, but I shall reserve that point. I have not sufficiently considered the cases cited to me, and I may possibly supplement what I have already said on the facts.

I can now state some of the findings with respect to the matter of the husband and wife, but I think I have already covered that. Perhaps I have already covered it fully; but, in case I have not done so, I add that the plaintiff was aware of the value, nature, and effect of the mortgage, and entirely comprehended what its meaning and effect was. I also find that she was not, from the standpoint of husband and wife, under her husband's influence; when I say that I mean that I think she was probably the stronger character of the two. I have never seen the husband: but I think, from the testimony as given, that she was the leading character in their married life, and that he did not exercise any special influence over her. That, however, I am saying without in any way interfering with the findings I may make with respect to the natural desire of a wife to save her husband from disgrace or arrest, or anything of that sort.

Then there are some of the points in the argument with which I can deal at the present time. I am clearly of the opinion, having regard to the decisions in *Macdonald v. Fox* (1917), 39 O.L.R. 261, and *Hutchinson v. Standard Bank of Canada* (1917), 39 O.L.R. 286, that, so far as the plaintiff's claim here is based on the presumption of invalidity in a transaction between husband and wife, the plaintiff cannot succeed. The cases cited by Mr. Grant in support of his application seem to have been very fully considered by the Court of Appeal in the case of *Howes v. Bishop*, [1909] 2 K.B. 390, and the rule seems to be clearly established by that case and by our own Appellate Division, following the Privy Council in *Bank of Montreal v. Stuart*, [1911] A.C. 120, that there is no presumption of invalidity in a transaction between husband and wife—that the wife, is not in need of independent advice if she understands the transaction.

Doing away with or rejecting the contention of the plaintiff that this transaction was attackable on the ground of the relationship of husband and wife, does not at all interfere with what I take to have been the principal ground urged on the part of the plaintiff, namely, the doctrine put forward in *Williams v. Bayley*

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(1866), L.R. 1 H.L. 200; and the plaintiff's claim in that regard is the point which I propose to reserve and consider further.

There is one other legal phase of the matter which I deal with at the present time, namely, that there was no agreement to stifle a prosecution. There was, in truth, no prosecution pending. It is very questionable, indeed, whether any prosecution could have succeeded, or whether any prosecution ought properly to have been brought. But, whether there was or not, I am perfectly clear, as to what took place at the Willard Apartments, where the mortgage was signed, and also earlier between the husband and the wife, that there was no agreement, expressed or implied, on the part of the defendants, to stifle a prosecution. They were at liberty, so far as I can see, notwithstanding anything that took place, to launch, if they chose, any proceedings they thought proper the day after this took place. And therefore that phase of the case is also dealt with and disposed of at the present time, reserving, however, as I say, for further consideration, the question of undue influence or pressure, or duress, as illustrated in the case of *Williams v. Bayley* and succeeding cases.

May 2. MASTEN, J.:—This action was tried before me at the Toronto non-jury sittings on the 24th April. On the morning of the 25th April, I reviewed the evidence and gave judgment against the several contentions of the defendants except on the issue as to whether the execution of the chattel mortgage complained of was the result of undue influence or pressure on the plaintiff.

The facts present difficulty, and I have given them careful consideration. I might have announced my conclusion in a few words by stating that I find that the plaintiff fully understood the meaning and effect of the security now attacked, that its execution and delivery were the acts of her own free will, and that she did not entertain any idea of repudiating the mortgage for 8 months, nor until the defendants sought to enforce it after the death of her husband; but the nature of the action itself, and the thorough manner in which it was presented by counsel for the parties, merit, I think, a fuller statement of my views.

The plaintiff is a young woman, not long married, who was, at the time when these events happened, living with her husband at the house of her parents in the outskirts of the city. He



telephoned her on the morning of the 11th August, 1916, asking her to meet him in town. She met him; and, according to her evidence, which cannot be disproved, he then, for the first time, told her that he was in difficulties, that his accounts were short more than \$690, that he was in danger of criminal prosecution, and that his employment by the defendants had been cancelled until the difficulties were adjusted. He requested her to aid him by giving the defendants security by way of a chattel mortgage on her furniture for the repayment to them of the deficiency. The chattel mortgage had already been drafted. They went to the apartments formerly occupied by them, where the furniture was. There they were joined, some time afterwards, by the defendants and by Mr. Kirkpatrick, a solicitor who acted for the husband and for the defendants, but who did not assume to act for the plaintiff. The plaintiff had no independent advice; and, on her suggesting that perhaps she ought to have independent advice and have time for consideration, one of the defendants said that "too much time had already been wasted." In the end, she signed the document, at about 4 o'clock in the afternoon.

On the other hand, I find that it is by no means established that the husband had been guilty of any criminal offence. He may have stolen the whole or some part of the \$696 referred to in the evidence; but whether he did or not remains unproved. The utmost that is established is, that he himself made up a statement shewing the sum of \$696 as the value of hay sold by him in regard to which he could give no satisfactory account, and that one of the customers of the defendants telephoned asserting that he had paid to the husband the account which he had turned in as an unpaid account.

The defendants stated in the witness-box that they did not then, and do not now, think that Fairweather was dishonest; and that they hoped, with his aid, to collect a considerable portion of the deficiency from their customers, believing that his accounts had merely become confused. In these circumstances, I think the defendants would have been ill-advised had they arrested him—and they positively deny any intention to prosecute him criminally.

Without making any express finding to that effect, I incline to the view that the defendants never formed any determination

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to arrest the plaintiff's husband. I have no doubt that it was present to their minds that he was in great straits and that he might well be liable to a criminal prosecution. There is no evidence that the defendants ever made threats of prosecution to the husband—though the fact that he expressed to his wife, the plaintiff, the conviction that, unless he was able to give security, he would be arrested, might infer such a threat; but this may have been the result of his own fears, and not of any threat on the part of the defendants.

In making these findings, I have taken into consideration as though admissible in reply the evidence of Mr. and Mrs. Walker.

I find that, in applying to his wife to give the security in question, the husband was influenced by two motives: first, to avoid criminal prosecution, which he feared; and, second, to secure his retention by the defendants in his employment. I find that the wife, in giving the security, was influenced by the same motives.

I find that the husband, in applying to the wife to give this security and in stating to her the danger in which he stood, was acting in his own behalf and not as the agent of the defendants.

I find that the defendants did not, at the interview at the Willard Apartments, on the 11th August, 1916, when the chattel mortgage was signed, or at any other time, threaten the plaintiff with the arrest of her husband.

I find that the plaintiff, though young, is a highly intelligent person, of very considerable force of character. I find that she thoroughly understood both her own ownership of the chattels pledged by the chattel mortgage and the nature and effect of the security which she was giving. I find that she did not execute the mortgage as a result of undue influence or pressure.

At the close of the argument I was much impressed with the circumstance that the plaintiff was taken by surprise and had not the opportunity for obtaining independent advice or for deliberation; but the effect of this circumstance is substantially modified, in my view, by the fact that, so far as the evidence goes, no complaint was made by her in respect to the giving of this security until the present action was launched—some 8 months later—and until after the husband's death; also by the circumstance that, the chattel mortgage having been given in August and the first instalment of interest falling due in October, the plaintiff insisted

upon the prompt payment of the interest, and took control of the making of such payment. This happened after she had had full opportunity for deliberation and for obtaining advice. Even assuming that the husband exercised undue influence, which, I find, was not the case, the plaintiff could succeed only if the defendants were aware, at the time when this security was given, that such undue influence had been exercised: *Cobbett v. Brock* (1855), 20 Beav. 524; *Bunbury v. Hibernian Bank*, [1908] 1 I.R. 261. There is no evidence of such knowledge on their part.

In these circumstances, I think the case comes within the law as stated by the Court of Appeal in the case of *McClatchie v. Haslam* (1891), 65 L.T.R. 691. In that case Lindley, L.J., says (p. 693) that the judgment below, which was in favour of the wife, arose from a misapprehension of the law laid down in *Williams v. Bayley*, L.R. 1 H.L. 200; and he adds:—

“It is not the law that, if a lady makes a sacrifice to get her husband out of a scrape, she can necessarily impeach the security which she gives, even although the result is to ‘stifle a prosecution.’ ”

Bowen, L.J., says (p. 693):—

“Kekewich, J., has pointed out that the true nature of the transaction is one that cannot stand in equity, if a wife gives security to get her husband out of a difficulty when she knows the difficulty may result in the criminal prosecution of himself. In such a case that security never could be enforced against the wife. To my mind that is rather too strong a proposition to lay down as a rigid rule of law. I think that you must look at the pressure in each case, as a question of fact.”

And Fry, L.J., says (p. 694), referring to the views of Kekewich, J.:—

“Now, I do not accept that as the law of England. I think it is quite possible that the directors may know that the man is liable to prosecution; the wife may know the same; and if she, of her own will, makes a sacrifice for the purpose of protecting her husband, that is not pressure and that is not a bargain.”

The expression of the Court in the case of *Williams v. Bayley*, L.R. 1 H.L. 200, must be read in the light of the facts of that case and also of the views which I have just quoted.

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It is laid down in the cases and in the text-books that there is in equity no rule defining inflexibly what kind or amount of compulsion shall be sufficient ground for avoiding a transaction, whether by way of agreement or by way of gift. The question to be decided in each case is, whether the party was a free and voluntary agent. In the absence of any special relation from which influence is presumed, the burden of proof is on the person impeaching the transaction, and he must shew affirmatively that pressure or undue influence was employed: Pollock on Contracts, 8th ed., p. 640 *et seq.*

There is no presumption in law against the validity of this security; and my conclusions of fact are, that the plaintiff was a free and voluntary agent, and that she has failed to shew affirmatively that the defendants procured her to execute the mortgage complained of through pressure or undue influence.

The plaintiff's action must, in my opinion, be dismissed. Costs will follow the result.

The plaintiff appealed from the judgment of MASTEN, J.

June 13 and 14. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

*Gideon Grant* and *L. C. Smith*, for the appellant, the plaintiff, commented on the "now or never" attitude of the defendants and relied on *Williams v. Bayley*, L.R. 1 H.L. 200, and *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173. The latter case is decisive against the defendants if, as the appellant contends, the evidence shews that the chattel mortgage was given in consideration of the defendants refraining from arresting the appellant's husband. In any case, the instrument is void for duress. In all fairness, the appellant was entitled to the delay she asked for in order to consider her position. This Court is as much entitled as the trial Judge was to draw the proper inference from the facts. There was here a stronger threat than there was in the *Williams* case. They referred to *Shorey v. Jones* (1888), 15 S.C.R. 398, and *Migner v. Goulet* (1900), 31 S.C.R. 26. The alleged agreement for the retention of the husband in his position was merely illusory. The old doctrine as to undue influence is stated in *Nedby v. Nedby* (1852), 5 De

G. & Sm. 377; but the cases are not in harmony with each other. Reference was made to *Cox v. Adams* (1904), 35 S.C.R. 393; *Turnbull & Co. v. Duval*, [1902] A.C. 429; *Howes v. Bishop*, [1909] 2 K.B. 390, which followed *Barron v. Willis*, [1899] 2 Ch. 578, the fact being overlooked that the *Barron* case was reversed by the Court of Appeal, [1900] 2 Ch. 121, and the decision of the Court of Appeal affirmed by the Lords: *Willis v. Barron*, [1902] A.C. 271. [MEREDITH, C.J.O., referred to *Euclid Avenue Trusts Co. v. Hobs* (1911), 24 O.L.R. 447]. The cases cited by the learned trial Judge are not authorities for his legal proposition.

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*D. O. Cameron*, for the respondents, the defendants, argued that the evidence and the law supported the judgment of the trial Judge. The appellant herself suggested the giving of the mortgage, and it was evident that she was a person of great intelligence, who had "cut her eye-teeth," and well knew what she was about. There is no evidence of any agreement to stifle prosecution or of the exercise of undue influence upon this appellant. The case is on all fours with *McClatchie v. Haslam*, 65 L.T.R. 691.

*Grant*, in reply.

July 15. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of Masten, J., dated the 2nd May, 1918, pronounced after the trial of the action before him, sitting without a jury, at Toronto on the previous 24th April.

Contrary to my first impression, I have come to the conclusion that the appellant is not entitled to succeed.

She brings her action to set aside a chattel mortgage given by her to the respondents, and she bases her claim to that relief on the ground that she executed the mortgage "through the duress, undue influence, and misrepresentation of, not only the defendants, but also of her husband, and without independent and competent advice and without full knowledge of the facts and of the transaction into which she entered."

The ground mostly relied upon on the argument before us, viz., that the mortgage was given to stifle the prosecution of the husband for the theft of money of the respondents, who were his employers, is not clearly taken in the pleadings, though perhaps the allegations of the 4th paragraph of the statement of claim are sufficient to entitle the appellant to rely upon it.

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It is settled law that where the consideration upon which an agreement to give money or property or a security is illegal, e.g., the stifling of a criminal prosecution, the money or property cannot be recovered back or the security be set aside at the instance of the person who has agreed to give it, on the ground of the illegality of the transaction, if it is no longer executory but has been carried into execution.

As the Chancellor points out in *Wood v. Adams* (1905), 10 O.L.R. 631, 637, 638, it was plainly laid down by Lindley, L.J., in *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, 182, that a plaintiff is "not entitled to relief in a court of equity on the ground of the illegality of his own conduct. In order to obtain relief in equity he must prove not only that the action is illegal, but something more: he must prove either pressure or undue influence. If all that he proves is an illegal agreement he is not entitled to relief. If, on the other hand, he can go further and shew pressure or undue influence, so as to bring himself within the doctrine applicable to transactions of that kind, then he is entitled to relief in equity, although the transaction may be illegal upon the ground that it is meant to stifle a prosecution."

The appellant cannot, therefore, succeed, unless one or other of the other grounds upon which she bases her claim to relief is made out.

If she has established that in the giving of the mortgage she was not a free agent, but gave it because of threats by the respondents that they would prosecute her husband criminally if she did not give it, she is entitled to succeed. The learned Judge has found against her on this branch of the case, and the appellant failed to satisfy me that his conclusion is wrong. His view was that the appellant was a free agent in the transaction, and that there was no agreement, express or implied, that, in consideration of the giving of the mortgage, they would not prosecute her husband. The onus of proving duress was upon the appellant; and it is clear upon her own testimony that the suggestion that she should give the security came from her husband, and that she acquiesced in it without having ever met the respondents or heard anything from them in respect of it—that she fully appreciated what the giving of it meant is also, I think, clear.



The only suggestion of pressure or duress is referred to in the reasons for judgment delivered on the 25th April, *supra*. The learned Judge finds that, on the occasion when the mortgage was executed, the appellant said, "If I do not sign the document what will happen?" or, "I don't know what to do, what if I don't?" and that one of the respondents answered, "It all depends on how much you think of your husband;" and, on the appellant's suggestion that she ought, perhaps, to have a lawyer, the respondent McCullough having said that "there had been too much time wasted, and no further time ought to be allowed."

I agree with the learned trial Judge that what was said did not amount to a threat to prosecute if the mortgage was not signed, or warrant a finding in favour of the appellant on the issue as to pressure or duress.

Upon the whole, I am of opinion that, if the findings of fact stand—and I see no reason for disturbing them—the conclusion of the trial Judge that the appellant was "a free and voluntary agent" in the transaction, and that she failed to shew affirmatively that the respondents procured her to execute the mortgage through pressure or undue influence, was right, and it follows that his judgment must be affirmed and the appeal be dismissed with costs.

*Appeal dismissed.*

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[APPELLATE DIVISION.]

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*Municipal Corporations—Work Authorised by Board of Commissioners of Sewage and Public Works—Act respecting the City of Guelph, 1 Geo. V. ch. 90, sec. 4 (7)—Use of Explosives—Negligence of Engineer—Injury to Member of Board—Liability of City Corporation—Volenti non Fit Injuria—Common Employment—Volunteer or Trespasser—Absence of Contractual Relation.*

The defendant city corporation was held liable to the plaintiff, who was mayor of the city and *ex officio* a member of the board of commissioners of sewage and public works (constituted by by-law passed under 1 Geo. V. ch. 90, sec. 4 (7)), for the negligence of the city engineer in the carrying out of a work which had been authorised by the board, viz., the blowing out with dynamite of part of a dam in the river which runs through the city. The plaintiff was in the danger-area and was struck by a piece of cement from the dam and injured, while he was endeavouring to keep back the crowd of persons who had assembled near the dam. The negligence found to be the cause of the plaintiff's injury consisted in not removing the crowd to a safe distance and in not covering or protecting the place of operation.

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Judgment of CLUTE, J., 41 O.L.R. 308, reversed.

The plaintiff was not a superintendent in charge for his employer of the work of blowing up the dam; he was not an employee of the defendant corporation, and occupied no different position with regard to the work than a member of the municipal council would have occupied had there been no board, and the work was being done under the direction of the council.

The engineer was an officer of the defendant corporation; it was his duty, under the provisions of the by-law by which he was appointed, to carry out the directions of the board as to matters which, under the provisions of the by-law by which it was constituted, were committed to its charge; and the defendant corporation was answerable for the consequences of his negligence in the performance of that duty.

The maxim *volenti non fit injuria* has no application where there is not a full appreciation of the risk.

The doctrine of common employment was not applicable, the plaintiff not being an employee of the defendant corporation.

The plaintiff was not a volunteer or a trespasser in any sense. He had a right to take such part as he might think necessary in the doing of the work; but he took no part, beyond undertaking to keep the people back on one side of the river, which he did by the invitation and with the acquiescence of the engineer acting within the scope of his employment. There was no contractual relation between the plaintiff and the defendant corporation; the plaintiff, as a member of the board, had a common interest with the defendant corporation in the work.

*Degg v. Midland R. W. Co.* (1887), 1 H. & N. 773, and *Potter v. Faulkner* (1861), 1 B. & S. 800, distinguished.

*Hayward v. Drury Lane Theatre Limited*, [1917], 2 K. B. 899, 906, referred to.

An appeal by the plaintiff from the judgment of CLUTE, J., 41 O.L.R. 308, dismissing the action without costs.

June 13. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

Sir George Gibbons, K.C., and V. H. Hattin, for the appellant, argued that the respondent corporation could not shield itself from liability either under the maxim *volenti non fit injuria* or by reference to the doctrine of common employment. On the first point they referred to *Smith v. Baker & Sons*, [1891] A.C. 325. All that the appellant did was to order the people to go back, and there is no evidence that he interfered in any way as assuming to be an expert. The engineer swears that he did not think there was danger, but he knew very little about his business. The danger could have been obviated by covering the work or making the people retire a sufficient distance. In failing to take either of these precautions, the engineer displayed gross ignorance and was guilty of negligence. The original negligence, as found by the trial Judge, was in not covering the work. As it was not covered, the engineer should have given the necessary directions for the retirement of the people to a safe distance. The appellant's

position was purely executive; the danger was not an obvious one; and he had a right to be where he was. There is no principle which justifies the finding that it was a case of common employment. They referred to *Hayward v. Drury Lane Theatre Limited*, [1917] 2 K.B. 899, in which *Degg v. Midland R.W. Co.* (1857), 1 H. & N. 773, and *Potter v. Faulkner* (1861), 1 B. & S. 800, were distinguished; also to *Wiggett v. Fox* (1856), 11 Ex. 832; *Johnson v. Lindsay & Co.*, [1891] A.C. 371. There is no principle of law which should prevent the appellant from succeeding here. He is as much entitled to recover damages for his injury as any stranger who was lawfully on the ground. He was not assuming to conduct the operation in any way.

*I. F. Hellmuth*, K.C., and *P. Kerwin*, for the defendant corporation, the respondent. The Act of 1 Geo. V. ch. 90, sec. 4(7), makes it the absolute duty of the board of commissioners to "have charge of the execution and carrying out of all works" such as those in question here. They referred to *McDougall v. Windsor Water Commissioners* (1900), 27 A.R. 566, affirmed (1901) 31 S.C.R. 326; *Young v. Town of Gravenhurst* (1911), 24 O.L.R. 467. The commissioners occupied the position of masters in connection with the work, and the appellant was very officious in what he did. The saving of the bridge was a work in connection with the bridge, and the engineer was the servant of the commissioners in carrying out the duty imposed upon them by the statute: *Fairweather v. Owen Sound Quarry Co.* (1895), 26 O.R. 604. It was like the case of compulsory pilotage. See Marsden's *Collisions at Sea*, 6th ed., pp. 228, 229. [HODGINS, J.A., referred to *Fowles v. Eastern and Australian Steamship Co.*, [1916] 2 A.C. 556.] The engineer was not negligent—the other engineers called as witnesses said they would have done as he did. Reference was made to *Schwoob v. Michigan Central R.W. Co.* (1905), 9 O.L.R. 86. The appellant's statements as to his taking no part in the direction of the work were untrue. He was in fact there as a sort of Grand Master of the Ceremonies. He undertook to exercise his own discretion as to the place where he should stand, and the respondent is not responsible for the consequences. Even if the appellant only assumed to assist the engineer as a private individual, he was a volunteer and the respondent is not liable: *Degg v. Midland R.W. Co.* and *Potter v. Faulkner*, *supra*. The *Hayward* case is distinguishable, as it turned on different considerations.

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*Gibbons*, in reply, argued that the *Hayward* case was a complete answer to the respondent's contention, and that the *Degg* case was an exceptional one, and not an authority here. The appellant was not a fellow-servant, nor in a common employment, nor was he a volunteer.

July 15. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment dated the 17th December, 1917, which was directed to be entered by Clute, J., after the trial of the action before him sitting without a jury at Guelph on the 11th day of that month: 41 O.L.R. 308.

The action is brought to recover damages for injuries sustained by the appellant owing, as he alleges, to the negligence of an employee of the respondent—its engineer—in the performance of his duties.

The appellant was the mayor of Guelph and a member of a commission, appointed under the authority of sec. 4 of ch. 90 of the statutes of 1911 (1 Geo. V.)

That section empowered the council to pass a by-law to place in the hands of a commission, among other things, the following "matters concerning city works:"—

(4) To instruct the city engineer in the discharge of his duties with respect to sewers, streets, drains, thoroughfares and bridges, and to report to the council from time to time on all matters connected with the performance by the engineer of his duties in the matters aforesaid.

(7) To have charge of the execution and carrying out of all works connected with sewers, drains, highways and bridges authorised by the council and the expenditure of all moneys appropriated by the council for the said purposes.

A by-law for these purposes was passed by the council on the 8th January, 1912, after having been assented to by the electors as required by the statute.

The statute makes applicable, *mutatis mutandis*, the provisions of secs. 40 to 46, both inclusive, of the Municipal Waterworks Act, and the amendments to that Act, with the proviso that, notwithstanding these provisions, "the council shall possess its powers and authority to determine, and incidental to such determination what works and improvements in respect of sewers, streets, thorough-

fares and bridges shall be undertaken and made, and the expenses thereof, and to carry out the provisions of the Municipal Act with respect thereto, but in respect of the execution and carrying out of the improvements and repairs so determined upon by the council the commissioners shall have and exercise the said powers and authority conferred under the Municipal Waterworks Act."

The Municipal Waterworks Act referred to is R.S.O. 1897, ch. 235, and, by sub-sec. 2 of sec. 40, it is provided that "all the powers, rights, authorities, or immunities which, under this Act, might have been exercised or enjoyed by the council and the officers of the corporation acting for the corporation, shall and may be exercised by the commissioners and the officers appointed by the commissioners, and the council thenceforth during the continuance of the board of commissioners shall have no authority in respect of such works;" and sub-sec. 4 of sec. 40 provides that "nothing herein contained shall be construed to divest the council of its authority with reference to the providing of moneys required in respect of such works, and the treasurer of the municipality shall, upon the written certificate of the commissioners, pay out any moneys so provided."

The engineer was appointed by by-law passed on the 19th day of July, 1915, and by it it is provided that he "shall perform all duties appropriate to the office of city engineer and such as have heretofore been performed by the city engineer of Guelph, including the duties which have heretofore been prescribed by by-laws or resolutions of the council which have been heretofore passed and duties to be prescribed by any resolutions to be hereafter passed by the council and any resolution or direction of the board of commissioners of sewage and public works . . . ."

In the spring of 1916, a freshet occurred in the river Speed, which passes through Guelph, and fears were entertained that a bridge in the city, crossing that river, would be carried away by the flood. This having come to the attention of the city engineer, and having been communicated by him to the board, a meeting of the board was held, and the engineer having recommended that, as a means for the protection of the bridge, a dam in the river should be blown up, the board approved of the recommendation and instructed the engineer to proceed with the work. The engineer proceeded with the work, employing in it tools and

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appliances belonging to the respondent and workmen in its employment.

Two attempts to blow up the dam were made on the same day. The first was unsuccessful, and the injuries of the appellant, who was present on both occasions, were sustained owing to his having been struck by a piece of cement which was thrown by the force of the second explosion. No attempt was made to prevent detached parts of the cement, of which the dam was composed, from flying wherever the force of the explosion would carry them. This might and ought as found by the trial Judge to have been done by placing a covering over the place where the explosives were set; nor were proper steps taken to see that a crowd of persons who to the number of 100 had assembled to witness the operation that was going on were either warned of the danger they might incur from the result of the explosion or to remove them from the danger-area, beyond seeing that they left the bridge on which they were standing, and went back from 150 to 175 feet from the place where the explosives were set. The engineer appears to have thought that at that distance they were in no danger. The learned trial Judge has found that in this also the engineer was negligent.

These findings of the trial Judge are supported by the evidence, and the case must therefore be dealt with on the hypothesis that the appellant's injuries were caused by the negligence of the engineer. The view of the trial Judge was that, although a person on the highway who was injured by flying debris could have maintained an action against the respondent for the recovery of damages for the injuries he had sustained, the appellant could not do so.

It is difficult for me to ascertain the exact legal ground upon which that conclusion was based. One of the reasons assigned for the conclusion is (41 O.L.R. at p. 313) that the appellant, at the instance of the engineer, "requested the people to move back from the danger-area," and therefore "knew there was danger, and exercised his own judgment where he would go to be free from that danger. In other words, in that sense he took the risk, believing that he was in safety where he was."

The learned trial Judge also was of opinion (pp. 313, 314) that the appellant, as a member of the board, had charge of the execution and the carrying out of the work that was going on, that he was bound to see that due care was taken; "and, being injured by



reason of that want of care and protection, he became the victim of his own negligence in the sense, not that he had full knowledge of the risk which he ran in the place where he was at the time of the accident, but that from his position and overcharge of the work he cannot take advantage of the oversight or negligence of a person who is subject to his authority, and thereby render the defendant liable."

The learned trial Judge appears to have treated the appellant as if he had been a superintendent in charge for his employer of the work of blowing up the dam; but, with respect, I am of opinion that that is an erroneous view of the position of the appellant as a member of the board. He was in no sense an employee of the respondent, and occupied no different position with regard to the work that was being done than a member of the municipal council would have occupied had there been no board, and the work was being done under the direction of the council.

It is abundantly clear upon the evidence that what the members of the board did was merely to approve of the recommendation of the engineer that the dam should be blown up, leaving entirely to him the selection of the means by which that should be accomplished and the carrying out of the work. The engineer was an officer of the respondent, and it was his duty as such, under the provisions of the by-law by which he was appointed, to carry out the directions of the board as to matters which, under the provisions of the by-law by which it was constituted, were committed to its charge; and, having been, as has been found, guilty of negligence in the performance of those duties, the respondent is answerable for the consequences of that negligence.

I do not know whether the learned trial Judge was of opinion that the maxim *volenti non fit injuria* applied. What he says leads me to think that he was. But the maxim has no application where there is not a full appreciation of the risk that is being run, and therefore no application to the case at bar, it having been found that the appellant had not a full appreciation of the risk that he ran in being where he was standing when he was injured.

I know of no reason why a member of a municipal council which has directed work to be done by its engineer, who from curiosity or from any other motive is present when the work is being done and is injured owing to the negligence or want of skill

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of the engineer in doing it, may not recover from the corporation damages for the injuries he has sustained; and, if he may, there is no reason why a member of a board to which the council has delegated the performance of its duties may not, in the like circumstances, recover.

The learned counsel for the respondent invoked the doctrine of common employment, but that doctrine can have no application, because, as I have said, the appellant was in no sense an employee of the respondent.

It was argued by counsel that the appellant, having undertaken the duty of keeping back the people on one side of the river, was a mere volunteer and could not recover for injuries sustained by him owing to the negligence of the engineer, and in support of that contention *Degg v. Midland R.W. Co.*, 1 H. & N. 773, and *Potter v. Faulkner*, 1 B. & S. 800, were relied on. These cases have, in my opinion, no application. It is pointed out in *Hayward v. Drury Lane Theatre Limited*, [1917] 2 K.B. 899, 906, that there is a distinction to be made between the case of a mere volunteer and a case "when the injured person voluntarily assists the master's servants in a service in which he has a common interest with the master and by the invitation or with the acquiescence of the master or his servant acting within the scope of his employment. He is not a mere volunteer and can recover if he is injured by the negligence of the master's servants." There are also expressions of opinion in the same case that the doctrine of common employment does not extend to cases where there is no contractual relation between the master of the negligent person and the injured person.

In the case at bar there was no contractual relation between the appellant and the respondent, and the appellant, as a member of the board, had a common interest with the respondent in the work that was being done, and what he did in undertaking to keep the people back was done by the invitation and with the acquiescence of the engineer acting within the scope of his employment.

I doubt, however, whether it is necessary for the appellant's case to rely upon that ground. The appellant was not a volunteer or a trespasser in any sense. The work that was being done was being done under the direction of the board of which he was a member, and he had a right to take such part as he might think necessary in the doing of the work. There is, however, no ground

for thinking that, beyond undertaking to keep the people back on one side of the river, he took any part in the doing of the work. All that was left entirely to the engineer, who frankly admitted his responsibility for the manner in which it was being done, and that neither the appellant nor any member of the board had any knowledge of the effect of the explosives that were used or the extent of the risk that was run from injury being occasioned by the flying débris—beyond this, that he and they apprehended that there would be the danger of the débris being thrown out by the explosion, but as to the extent of the danger-area they had no idea.

Upon the whole, I am of opinion that the appeal should be allowed with costs and the judgment be reversed, and there be substituted for it a judgment for the appellant for the amount at which the damages were contingently assessed, with costs.

*Appeal allowed.*

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[APPELLATE DIVISION.]

BAILEY COBALT MINES LIMITED V. BENSON.

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May 1.  
July 15.

*Costs—Security for—Company out of Ontario Brought into Winding-up in Ontario and Desiring to Appeal from Interim Report—Inherent Power to Order Security for Costs of Appeal—Amount of Security—Practice—Action Brought in Name of Company in Liquidation—Termination by Incorporation in Winding-up—Style of Cause—Jurisdiction to Order Security—Master Having Conduct of Reference—Order Made by Master in Chambers without Jurisdiction—Affirmance by Judge in Chambers—Order of Judge Treated as Substantive Order—Appeal—Order Varied.*

Where a person not resident in Ontario is brought into an action in Ontario, either by being personally served abroad, or on his application to be added as a party defendant, and, after having been heard is unsuccessful and desires to appeal, the Court has inherent power to order him to give security for the costs of the respondent or respondents in the proposed appeal.

The amount of security should be sufficient only to cover the costs of such appeal.

Where proceedings for the winding-up of a company had been begun, and an action was brought in the name of the company, by leave granted in those proceedings, and an order was subsequently made referring the matters in question in the action to the Master, "to be heard and determined by him in the winding-up proceedings and as part thereof:"—

*Held*, that the action as a proceeding collateral to the winding-up was terminated and ceased to exist: there is no such thing as consolidation of an action and a winding-up.



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Where the proposed appeal is from a report of the Master to whom the winding-up has been referred, the application for security for the costs of the appeal should be made to that Master—the Master in Chambers, not being the Master in charge of the reference, has no jurisdiction.

The order of FALCONBRIDGE, C.J.K.B., which affirmed an order of the Master in Chambers requiring the appellant in a proposed appeal from a report of the Master in Ordinary to give security for costs, was treated as a substantive order, and affirmed upon appeal, subject to variation as to the style of cause and the amount of the security; MACLAREN, J.A., dissenting.

AN appeal by the defendant the Profit Sharing Construction Company from an order of FALCONBRIDGE, C.J.K.B., in Chambers, of the 9th April, 1918, dismissing an appeal from an order of the Master in Chambers, by which the appellant company was required to “give further security in the sum of \$3,000 to answer the plaintiffs’ costs of the action, reference, and proceedings.”

Leave to appeal from the order of FALCONBRIDGE, C.J.K.B., was given by SUTHERLAND, J., for the following reasons:—

May 1. SUTHERLAND, J.:—One Edwin A. Benson, a director of the Bailey Cobalt Mines Limited, which company is one of the plaintiffs herein, obtained a judgment bearing date the 11th June, 1914, against that company, for \$90,788.89 and costs. On the 26th June, 1914, an order for the winding-up of the said company was made. On the 15th February, 1915, for an alleged consideration of \$5,000 and other valuable consideration, Benson assigned his said judgment to the Profit Sharing Construction Company, a foreign corporation.

An action was commenced by the plaintiffs, against Benson and other directors of the said company in liquidation, for damages for “fraud and misfeasance in office in relation to the company,” in which the said judgment obtained by Benson against the company was attacked. The Profit Sharing Construction Company was not originally made a defendant, but subsequently applied to be added as a defendant. Thereupon a motion for security for costs was made by the plaintiffs, and an order thereupon obtained, which order the Profit Sharing Construction Company complied with.

Certain references were directed to the Master in Ordinary, who made certain reports pursuant thereto. One of these bears date the 22nd December, 1917, from which the Profit Sharing Construction Company is appealing.

The plaintiffs applied to the Master in Chambers for and obtained an order that the defendant company "give further security in the sum of \$3,000 to answer the plaintiffs' costs of the action, reference, and proceedings;" and "that the defendant company's proceedings be stayed until such security be given." The defendant company appealed therefrom, and its appeal was dismissed by order of Falconbridge, C.J.K.B., dated the 9th April, 1918.

This is a motion under Rule 507 for leave to appeal from the said last-mentioned order.

Now that the said defendant company has been properly made a defendant, and having regard to what Kekewich, J., said in *In re Miller's Patent* (1894), 11 R.P.C. 55, 70 L.T.R. 270, at p. 271, namely—"If he is without the jurisdiction, and comes within the ordinary rule with regard to security for costs, he certainly would be stopped from making that application until he had given security for costs, that is to say, the costs of that application; but having succeeded after giving security, and having got an order that he be made defendant, there is no further security for costs. He is a defendant out of the jurisdiction, and he is at liberty to defend without giving security for costs"—I think this leave should be given.

The decisions are somewhat conflicting: and the report of the Master involves matters of considerable importance to the defendant company, which might be finally determined against it unless the order for security were complied with. Reference also to *Vavasour v. Krupp* (1878), 9 Ch. D. 351; *Apollinaris Co. v. Wilson* (1886), 31 Ch. D. 632; *Ward v. Benson* (1901), 2 O.L.R. 366.

Costs of the motion in the cause.

June 12 and 13. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

*R. S. Robertson* and *G. H. Sedgewick*, for the appellant company, argued that the Master in Chambers had no jurisdiction to make the order requiring security, which was not in accordance with the well-established practice, when the action is at an end and a reference is pending before the Master in Ordinary. [They were stopped.]

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*W. Laidlaw*, K.C., for the respondents, the plaintiffs and the liquidator, argued that the order appealed against was properly made. The question was whether or not the Profit Sharing Construction Company was now the real plaintiff in the action. If it was, it should give security, being outside the jurisdiction. He referred to *Stow v. Currie* (1910), 20 O.L.R. 353; *Apollinaris Co. v. Wilson*, 31 Ch. D. 632.

*Robertson*, in reply, referred to the Rules as affording no authority for the procedure which had been adopted, and argued that the *Stow* case had no application to the matter. [MEREDITH, C.J.O., referred to *J. H. Billington Limited v. Billington*, [1907] 2 K.B. 106.]

July 15. HODGINS, J.A.:—Appeal, by leave, from the order of the Chief Justice of the King's Bench dismissing an appeal from the order of the Master in Chambers, who directed the appellant company to give security to the extent of \$3,000 on its appeal from a Master's interim report in the winding-up of the above-named company.

It is not necessary to go into the particular facts of this case. There is enough apparent in the proceedings to warrant security being given on the appeal for the costs thereof, if attention is to be paid to special circumstances.

But the point is really one of practice, and can be stated thus. If a foreign person or company is brought into an action here, either by being properly served abroad, or on his application to be added as a party defendant, and, after having been heard, is unsuccessful and desires to appeal, is there power to treat such person or company as the Rules would treat them if they came here originally to sue?

I think there is inherent power in the Court so to deal with them, notwithstanding that an appeal is in this Province merely a step in the cause. Such a person or company becomes, on the appeal, an actor desiring relief against the rights decreed to other parties, and, being outside the jurisdiction, should give such security as will enable the resident parties to recover their costs if they succeed.

In the case of *J. H. Billington Limited v. Billington*, [1907] 2 K.B. 106, the decision is based upon the inherent power of the



Court to order security to be given in any case where it is thought just so to do. This authority exists in the Supreme Court of this Province, as well as in the English Superior Courts. *Stow v. Currie*, 20 O.L.R. 353, much relied on, depends upon the then Rule 1208, under the Judicature Act, and is based upon the fact that the security which already had been given covered past as well as future costs.

While, therefore, the jurisdiction of the Court may be maintained to order security, the amount fixed should be sufficient only to cover the costs of an appeal, which will be to a Judge in Court: *Re Sarnia Oil Co.* (1891), 14 P.R. 335; *Re McLean Stinson and Brodie Limited* (1910), 2 O.W.N. 435.

The amount mentioned should, therefore, be reduced to \$200.

The proceedings appear to have been somewhat misconceived. The order is styled in an action which came to a conclusion when its end was served. Winding-up proceedings had been begun, and the action was brought by leave in those proceedings. The only reason for the bringing of an action, apart from the winding-up proceedings, is because it is thought that a conclusion reached by the trial of an action will be more satisfactory than one worked out in the Master's office, or because of difficulties as to parties.

But when, on the 24th January, 1917, Mr. Justice Masten directed that the matters in question in the action be referred to the Master in Ordinary, "to be heard and determined by him in the winding-up proceedings and as part thereof," he decreed the termination of the action as a proceeding collateral to the winding-up, and decided that all the benefit of the action might in the future be obtained in and as part of the winding-up. It could not thereafter have any separate existence or be still covered by the leave originally given, as against the subsequent order of the Court making it part of the winding-up proceedings before the Master. There is no such thing as consolidation of an action and a winding-up: *per North, J.*, in *Lovett v. Oxfordshire Ironstone Co.* (1886), 30 Sol. J. 338.

The Master in Chambers had no jurisdiction to make the order in question, having regard to the order of reference, which is, it is stated, in the usual form: *Re Joseph Hall Manufacturing Co.* (1884), 10 P.R. 485; *Re Sarnia Oil Co.* (1893), 15 P.R. 182. The proper person to apply to for the order in question would have

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been the Master in Ordinary, who had charge of the reference, and before whom it is still pending: *Re Sarnia Oil Co.*, 14 P.R. 335. But, treating the order of the learned Chief Justice of the King's Bench as a substantive order, notwithstanding what is pointed out in *Re J. McCarthy & Sons Co. of Prescott Limited* (1916), 38 O.L.R. 3, 32 D.L.R. 441, it may, after amendment of the style of cause so as to limit it to the winding-up proceedings, be affirmed save as to the amount, which should be reduced to the sum already named, which should be stated to be security only for the costs of the proposed appeal.

No costs of this appeal.

MEREDITH, C.J.O., and MAGEE, J.A., agreed with HODGINS, J.A.

MACLAREN, J.A., dissented.

*Order below varied.*

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July 15.

[APPELLATE DIVISION.]

MCPHERSON V. CITY OF TORONTO.

*Master and Servant—Dismissal of Servant—Member of Municipal Fire Brigade—Action against Municipal Corporation for Wrongful Dismissal—Justification—Immoral Conduct—Boasting of—Justification of Dismissal on Ground not Assigned.*

The plaintiff was dismissed from his employment as a member of the fire brigade of the defendant corporation, because, being a married man, not living with his wife, he had living with him the wife of another man, and refused, on being threatened with dismissal if he continued to have her in the house, to banish her from it:—

*Held*, that the conduct of the plaintiff was such as to justify his dismissal.

*Held*, also, that his dismissal might be justified for a cause not assigned and not known to his employer at the time of dismissal; and his boasting to his comrades in the brigade of having illicit relations with his neighbour's wife was another good ground for his dismissal.

AN appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of York, after a trial without a jury, dismissing the action, which was brought to recover damages for the plaintiff's alleged wrongful dismissal from his employment as a member of the Toronto Fire Brigade, the ground assigned for his dismissal being that he, being a married man, separated from his wife, had living with him the

wife of another man, and refused, on being threatened with dismissal if he continued to have her in the house, to banish her from it, his conduct being considered by the Chief of the brigade to be prejudicial to the interests of the brigade and the public.

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June 11. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

*T. N. Phelan*, for the appellant, argued that his dismissal could not be justified under sec. 246 of the Municipal Act, R.S.O. 1914, ch. 192, and *Vernon v. Corporation of Smith's Falls* (1891), 21 O.R. 331, and the other cases on this section cited in Meredith & Wilkinson's Municipal Manual, pp. 192, 193. The by-laws relied on by the defendants were not made a term of the contract or brought to the appellant's attention. He had served for four years, had made contributions to the benefit fund, and no shadow of misconduct could be imputed to him. There was no proof of the alleged insubordination and defiance of the Chief on his part. Counsel referred to *McDougal v. Van Allen Co.* (1909), 19 O.L.R. 351, and Macdonell's Law of Master and Servant, 2nd ed., pp. 76-78.

*Irving S. Fairty*, for the defendants, respondents, said that, while no improper relationship was alleged to exist between the appellant and the woman who lived under the same roof with him, it was impossible to regard the appellant as a haloed martyr, in view of the boastings in which he had indulged and which, though denied by him, were sufficiently proved. As to the power of the council to pass by-laws regulating such matters as were in question, counsel referred to the Municipal Act, R.S.O. 1914, ch. 192, secs. 250, 400 (14); and, as to the obligation on all persons to take notice of such by-laws, to *The Queen v. Osler* (1872), 32 U.C.R. 324. The Chief had not merely the right to act as he did—it was his duty to do so: *People ex rel. Connolly v. Police Commissioners* (1877), 11 Hun 403; *People ex rel. Gardner v. McAdoo* (1906), 99 N.Y. Supp. 949.

*Phelan*, in reply, argued that the alleged boastings were positively denied by the plaintiff, and not found proved by the trial Judge.



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July 15. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of York, dated the 17th April, 1918, which was directed to be entered by the Senior Judge of that Court, after the trial of the action before him, sitting without a jury, on that day.

The appellant was a member of the Toronto Fire Brigade, and his action is brought to recover damages for his alleged wrongful dismissal from his employment.

The main question for decision is as to whether the ground upon which he was dismissed by the Chief of the brigade was a sufficient ground to justify the dismissal.

The appellant is a young man, not living with his wife, and he had living with him the wife of another man, a comparatively young woman, who was separated from her husband. Complaint was made to the Chief on account of this, and, after investigation, he informed the appellant that he must leave the brigade if he did not cease to have the other man's wife living under the same roof with him. This the appellant refused to do, and the Chief, being of opinion that the appellant's conduct was prejudicial to the interests of the brigade and the public, dismissed him.

I take the law to be as stated by Armour, C.J., in *Marshall v. Central Ontario R.W. Co.* (1897), 28 O.R. 241, 243, quoting from the judgment of Lopes, L.J., in *Pearce v. Foster* (1886), 17 Q.B.D. 536, at p. 542:—

"It is sufficient" (i.e., to justify the dismissal of a servant) "if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant."

In *Labatt on Master and Servant*, 2nd ed., vol. 1., p. 926, sec. 297, it is said:—

"In some classes of employments, it is one of the implied stipulations of the contract that the employee will refrain from conduct which, although not immoral, is indecorous to a degree likely to endanger his own reputation and injure his employer's interests. The only reported cases in which this doctrine has been adverted to relate to teachers, but its applicability to many other classes of employees is indisputable. Whether the conduct proved

amounts to a breach of duty *quoad* a particular person is a question of fact. The standard of decorum plainly varies considerably, according to the character of the occupations and the sex of the employee."

With this statement of the law I agree; and, applying it to the case in hand, I am of opinion that, having regard to the nature of his employment, the conduct of the appellant was such as to justify his dismissal.

His employment was one in which only men of good character and conduct should be employed. His duties were such that at any time he might be called upon to enter the houses of citizens, both in the day-time and at night. It was important, too, that, brought into contact as he was with the other members of the brigade, he should do nothing to affect prejudicially the discipline of the body to which he belonged. His position was, besides, that of an employee of a municipal corporation, and I cannot believe that his conduct was not such as to affect prejudicially the reputation of his employer.

He was apparently living in open adultery, and his refusal to comply with the request of the Chief to cease to have his neighbour's wife living under his roof, in my opinion justified the Chief in dismissing him. Whatever the fact may have been, the circumstances were such that the public would naturally come to the conclusion that improper relations existed between the appellant and his neighbour's wife, and I cannot believe that the respondent was bound to retain in its service a member of its fire brigade who persisted in maintaining the conditions which led to the complaint against him. It was urged that there was no precedent for holding that the appellant's conduct was such as to justify his dismissal, but I am prepared if necessary to make one and to hold that an employee of the public whose conduct was such as that of the appellant may be dismissed if he persists in so conducting himself.

The judgment may also be supported upon the ground that the appellant was guilty of boasting to his comrades in the brigade of having illicit relations with his neighbour's wife. This aspect of the case was not dealt with by the trial Judge—no doubt because he came to the conclusion that the other ground with which I have dealt was sufficient to justify the dismissal. That these boasts were made was well proved; that the appellant made them was

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testified to by three other members of the brigade, and was met only by the denial of the appellant.

Although it was not known to the Chief that these boasts were made, and the making of them was not a ground assigned for the dismissal, it is clear law that the dismissal of an employee may be justified for a cause not known to the employer at the time when the dismissal took place.

I would affirm the judgment and dismiss the appeal with costs.

*Appeal dismissed.*

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[APPELLATE DIVISION.]

GRAIN GROWERS EXPORT CO. v. CANADA STEAMSHIP  
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*Ship—Carriage of Grain—Damage by Water—Hole Made in Side of Ship—Evidence as to Cause of Hole—"Seaworthiness"—"Due Diligence"—Negligence—Perils of Navigation—Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61, secs. 6 and 7 (D.)—Findings of Trial Judge—Appeal.*

Grain shipped by the plaintiffs in the defendants' barge was damaged by water:—

*Held* (FERGUSON, J.A.; dissenting), that the damage was caused by the unseaworthiness of the barge, and the defendants were liable.

Sections 6 and 7 of the Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61 (D.), considered.

Judgment of MIDDLETON, J., reversed.

*Per* HODGINS, J.A.:—The proper conclusion from the evidence was that the vessel was not seaworthy, so far as the cargo of grain was concerned. "Seaworthiness" includes not only staunchness in the sense of being built to withstand the elements without injury to the hull, but also comprehends a condition which will include the safety of the cargo, both from perils of the sea as commonly understood, and from causes not accompanied by violence of the elements, such as leakage. A grain cargo must be carried dry, and the seaworthiness of a vessel in relation thereto will depend upon her capacity in that respect.

Nor could due diligence in regard to seaworthiness be found. The words "exercises due diligence to make the ship in all respects seaworthy," found in sec. 6, mean not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so, as far as diligence can secure it.

Under sec. 7, the ship-owner must shew that the loss occurred from a danger of the sea or arose without his actual fault or privity or that of his agents, servants or employees. The onus is on him to bring himself within the exceptions. If the hole that was found in the side of the barge was made by striking the dock, owing to bad steering, it was not caused by a peril of the sea. It had not been proved that the loss had wholly arisen from a peril of the sea or without the fault or privity of the owner.



*Lennard's Carrying Co. Limited v. Asiatic Petroleum Co. Limited*, [1915] A.C. 705, and *Virginia Caroline Chemical Co. v. Norfolk and North American Steam Shipping Co.*, [1912] 1 K.B. 229, 243, 244, applied.

*Per* FERGUSON, J.A.:—The findings of fact of the trial Judge were supported by the evidence, and his judgment should stand unless it was shewn that, in drawing his conclusions, he had misapprehended or misapplied the law. The only reasonable inference from the evidence was that the hole was made either by a collision with the dock or by striking some unknown obstacle. The defendants had not affirmatively established how the hole was made, but they had established that it could not have been made except by causes covered by the words of secs. 6 and 7.

An action by the owners of a cargo of grain against the owners of the barge carrying the grain to recover damages for injury to the grain sustained during carriage.

January 12, 15, and 16, 1917. The action was tried by MIDDLETON, J., without a jury, at a Toronto sittings.

*J. H. Moss*, K.C., and *W. Lawr*, for the plaintiffs.

*N. W. Rowell*, K.C., and *Casey Wood*, for the defendants.

January 24, 1917. MIDDLETON, J.:—The amount of the damage has been agreed as \$16,319.85 if the plaintiffs can establish their right to recover.

The "Moravia" is a barge, having no motive power of her own—towed from port to port by tugs. She was built in 1888, of oak planks, on a frame part of steel and part of wood; 239 ft. long, 39 ft. beam, and 16 ft. moulded depth.

She was purchased by the defendants in 1915 for use as a grain-carrier, and the occurrence giving rise to this action took place on her first trip for the present owners.

She was taken to the Government elevator at Port Colborne, on the 2nd May, 1915, and there loaded with the view of being towed through the Welland canal and to Montreal.

Shortly after leaving the elevator-dock, she was found to be leaking badly, and, without entering the canal, was taken back to the elevator, where the dry grain was removed, and she was then taken to another dock and the wet grain was taken out of her hold.

She was then overhauled, and, it is said, a hole was found in her side. This hole was in the second plank below the light load-line, and penetrated the plank (5 inches thick) backed by heavy oak ribs 7 inches apart.

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The hole was at the end of a deep gouge in the plank, and appeared to have been made by the boat running into some obstacle. This hole, according to the defendants' contention, was the cause of the flow of water into the hold of the boat, and was the result of some peril of navigation for which they are not liable.

The plaintiffs' contention cannot be so shortly stated. In the first place, it is said that the hole did not in fact exist; and, in the second place, the hole, if it did exist at all, was quite inadequate to account for the water that flooded the boat.

The boat was old, and had not been used during the season of 1914, so that for one summer and two winters she had been lying at dock in Tonawanda. This left all her sides above the light load-line high and dry. The charge is that she was not properly caulked, and that, when the load was placed bringing these seams below the water-line, such leaking followed as to cause, in whole or in part, the flooding which damaged the grain.

At first sight the evidence of Mr. Mitchell would go to indicate that the hole, if of the size stated, would not admit enough water to flood the grain as it was flooded. But Mr. Mitchell's evidence only gave data to be applied to the statements of the witness Gaskin, and his statements are manifestly erroneous. There was 6 ft. of water in the sounding-well. Gaskin said this meant 366 tons of water above the floor, on the theory that a quantity of grain would permit half of its bulk of water to the interstices. There were only 10,600 bushels of wet grain—so the water would occupy the same space as 5,300 bushels, which would be equivalent to 212 tons—but 6 ft. was not reached till after the boat was in dock, 5 ft. being the maximum before, which would reduce the amount of water to 159 tons (6 ft.—2 ft. below floor = 4 ft. 5 ft.—2 ft. = 3 ft.;  $\frac{3}{4}$  of 212 = 159); and, bearing in mind that the inflow would increase as the boat sank, this amount does not indicate that the statements of the defence-witnesses cannot be true. Nor do I think I can discard the evidence of the many witnesses who saw the hole. They may not have given its dimensions with accuracy, and too much cannot be built up on any theory as to the amount of water which will flow through an orifice, unless there is an accurate measurement of the orifice.

The defendants have shewn that the boat was overhauled and

put in good shape by competent and experienced men—she was inspected for the underwriters' grading—but the officer who inspected her was not called by either party. I think it would have been more satisfactory if he had been called.

The evidence of this inspection and overhauling and the fact that, after this hole had been repaired, the boat did not leak, convince me that the hole was the cause of the damage. I think the pumps could have cared for the leakage apart from this.

How the hole came to be made is not very satisfactorily shewn. Some of the witnesses for the defence were interviewed by counsel for the underwriters after the 2nd May, and before the hole had been found on the 7th May. Statements were then taken, which have been put in by the plaintiffs' counsel, in which it is said that, as the boat left the elevator and was being towed out of the slip, she was blown against the corner of the Maple Leaf dock and damaged. This would explain the injury to her hull subsequently found, and I am inclined to think it is what happened. The damage might be caused by a projecting bolt-head in the cribs. No bolt can now be found by divers, but it might well be torn or broken off.

Some contention was made that the voyage had not begun, as the barge was to stop at the coal-dock to unship a spar. This was originally intended, but the order had been cancelled, and the voyage had begun.

These being my findings of fact, the case is brought within sec. 6 of the Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61.

The inspection and repair, including the caulking of the seams, was, I think, due diligence to make the ship seaworthy, and the damage resulted from some fault or error in navigation or the management of the ship, if the hole was the result of the collision with the dock. If from some unknown obstacle, then the hole was made without negligence—and was a peril of navigation.

The provisions of the Merchant Shipping Act also afford a defence.

The regulations of the Register called for a docking of the boat. Had the injury resulted from any defect that docking would have remedied, then the case would have presented greater difficulty, but docking is only necessary to reach that part of the boat below light load-line, and it was shewn that, when unloaded, the boat

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did not leak at all, either before or after the 2nd May, save through the hole in question.

The action is dismissed with costs.

The plaintiffs appealed from the judgment of MIDDLETON, J.

March 18 and 19. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*J. H. Moss*, K.C., and *Christopher C. Robinson*, for the appellants. The defendants rely on the Water-Carriage of Goods Act, especially sec. 6, which, they say, absolves them from liability under the circumstances of this case. We say that the case is not within that statute, and that the defendants are liable for breach of warranty in that the vessel was not seaworthy when the voyage began, owing to a lack of due diligence on their part. Such diligence must be shewn before the defendants can claim the benefit of the statute. The learned trial Judge seems to have thought that it was rather for us to keep the defendants out of the statute than for them to bring themselves within it. The finding that the damage was caused by a hole made after the voyage began, by the ship being blown against a corner of the dock, is not supported by the evidence, and the whole story about the hole and the alleged fish which was jammed in it by a snag, is of a highly suspicious and unsatisfactory character. In such a case as this the carrier is *primâ facie* liable, and the incorporation of the statute does not relieve him from liability. Reference was made to *Liver Alkali Co. v. Johnson* (1874), L.R. 9 Ex. 338; Halsbury's Laws of England, vol. 26, pp. 225, 226; *Dobell & Co. v. Steamship Rossmore Co.*, [1895] 2 Q.B. 408, 413; *Taylor v. Liverpool and Great Western Steam Co.* (1874), L.R. 9 Q.B. 546; Halsbury, *op. cit.*, vol. 26, p. 116, para. 197, and the case there cited of *Steel v. State Line Steamship Co.* (1877), 3 App. Cas. 72, 84, 85, 89; *The Glenfruin* (1885), 10 P.D. 103; *Gilroy Sons & Co. v. Price & Co.*, [1893] A.C. 56; *Anderson v. Morice* (1874), L.R. 10 C.P. 58; *Pickup v. Thames Insurance Co.* (1878), 3 Q.B.D. 594. The defendants have failed to prove the exercise on their part of the due diligence which is required by the statute. *The Carib Prince* (1898), 170 U.S. 655, and *International Navigation Co. v. Farr & Bailey Manufacturing Co.* (1901), 181 U.S. 218, American cases decided on a

similar statute, are in point. If the Court should come to the conclusion that the learned trial Judge merely made a guess at the cause of the accident, it is not bound to follow his guess. They also referred to *The Ratata*, [1897] P. 118, 127, 128, affirmed [1898] A.C. 513, 517; and, on the question whether the inspection and repairs made by the defendants at Tonawanda constituted "due diligence" under the 6th section, reference was made to *Hyman v. Nye* (1881), 6 Q.B.D. 685, and cases there cited, and to *Readhead v. Midland R.W. Co.* (1869), L.R. 4 Q.B. 379, 393.

*Casey Wood* and *E. G. McMillan*, for the defendants, respondents, argued that the judgment of the learned trial Judge was supported by the evidence and the authorities, and that the defendants were entitled to the benefit of the exemption from liability established by the Act of 9 & 10 Edw. VII. ch. 61, secs. 5, 6, and 7, and also by sec. 964 of the Canada Shipping Act, R.S.C. 1906, ch. 113. The last mentioned section is based on sec. 502 of the English Merchant Shipping Act, 1894, and so the recent case of *Ingram & Royle Limited v. Services Maritimes du Tréport Limited*, [1914] 1 K.B. 541, is in favour of the defendants. The effect of this section is to exempt the defendants from liability unless the issue of seaworthiness is found against them, and in the circumstances of this case an onus is placed on the plaintiffs which they have failed to satisfy. Counsel referred to the measurements shewing the inflow of water at the hole, as confirming the view of the defendants, and argued that it must have been caused by a sharp instrument, and not by the vessel striking the dock, as suggested on behalf of the plaintiffs. The maxim *omnia præsumentur contra spoliatorem* had no application to the case at bar.

*Moss*, in reply.

July 15. HODGINS, J.A.:—Appeal from the judgment of Middleton, J., dismissing with costs this action, which is really brought by the underwriters in the name of the appellants. The issues, however, do not arise under any insurance policy, but must be determined by the common law as expressed in maritime jurisprudence.

It is clear that at common law the ship-owner is a common carrier, and as such the insurer of the goods he receives, and

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bound to carry them safely, and he warrants the seaworthiness of his vessel. Seaworthiness is a necessary condition of the carriage, and it should be noted that absence of this prime factor of safety adds to every peril mentioned in sec. 6 of the Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61, namely, those encountered in navigation or caused by mismanagement of the ship or resulting from any latent defect. This condition may, of course, be modified by statute or contract. The only finding of fact made by the learned trial Judge is that there was a hole in the ship's side, but as to its origin he says:—

“How the hole came to be made is not very satisfactorily shewn. Some of the witnesses for the defence were interviewed by counsel for the underwriters after the 2nd May, and before the hole had been found on the 7th May. Statements were then taken, which have been put in by the plaintiffs' counsel, in which it is said that, as the boat left the elevator and was being towed out of the slip, she was blown against the corner of the Maple Leaf dock and damaged. This would explain the injury to her hull subsequently found, and I am inclined to think it is what happened. The damage might be caused by a projecting bolt-head in the cribs. No bolt can now be found by divers, but it might well be torn or broken off.”

The learned trial Judge does not seem to have been very firmly convinced by the explanation; and, except upon one point, namely, that the hole did exist in the side of the vessel, he has not made such findings as would naturally bind an appellate tribunal. But he has, though hesitatingly, drawn an inference that the hole spoken of in the evidence was the cause of the flooding. He apparently drew this conclusion because “it was shewn that, when unloaded, the boat did not leak at all, either before or after the 2nd May, save through the hole in question.” But the hole was not there before the 2nd May, nor were the top-sides then under water; and afterwards, when unloaded, the pumps kept the boat clear till she was repaired on the 8th or 9th May.

The credibility of the witnesses who were called to establish the existence of and to explain the discovery of the hole and its repair was strongly called in question before us and doubtless before the learned trial Judge. The point was a crucial one and depended upon the learned Judge's belief in the testimony of the



discovery of a fish and a stick in the hole itself, the pumping out of smaller fish which could not have come through the seams, the shape and character of the hole, the circumstances of its discovery and attending its removal, and the putting in of the new plank and the speed with which this was done, and the reason alleged therefor. All this makes it very difficult to differ from the conclusion he has reached that the hole existed, notwithstanding some very persuasive circumstances to the contrary. How it came there raises great difficulty, and upon that point I do not find that the learned Judge commits himself, for he says this: "The inspection and repair, including the caulking of the seams, was, I think, due diligence to make the ship seaworthy, and the damage resulted from some fault or error in navigation or the management of the ship, *if the hole was the result of the collision with the dock. If from some unknown obstacle*, then the hole was made without negligence—and was a peril of navigation."

It is not unusual in maritime cases to be unable to point to the exact cause of an injury to a ship. The case of *Anderson v. Morice*, L.R. 10 C.P. 58, is an illustration of this. One has to infer as best he can what the circumstances point to, and the only importance of considering the question critically is in order to decide on whom the onus in the case in hand rests and whether it has been discharged.

It has been recently settled in the case of *Lennard's Carrying Co. Limited v. Asiatic Petroleum Co. Limited*, [1915] A.C. 705, that parties who plead sec. 502 of the Imperial Merchant Shipping Act must bring themselves within its terms, and this, I think, gives a key to the interpretation of both sections in our Water-Carriage of Goods Act which have been specially referred to. This decision sets at rest a vexed question on which the Judges divided in *Ingram & Royle Limited v. Services Maritimes du Tréport Limited*, [1914] 1 K.B. 541.

The barge "Moravia" was a wooden vessel, about 29 years old, bought by the respondents in 1915 for \$5,000. She had not been dry-docked since 1908, and had a "hog" in her of about 10 inches; "a pretty good big hog" is how it is described by Captain Robinson, who was in the employ of the vendors when the respondents bought her. The "hog" would, unless she was loaded with great care, cause the butts to open and let in water. This occurs

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if too much of a load is placed in the middle of the boat. She was repaired at Tonawanda, when sold, under Robinson's supervision. He had sailed her from 1910 to 1913, carrying iron ore and coal. On being asked whether she was seaworthy when she left Tonawanda, he answers: "That is all I can say, as far as her covering board, she was good. She was searched up and caulked. . . . She was seaworthy enough when she left here." He said that when she was sold her top-sides were dried from the water-line up, having been out of the water for two years, two winters and one summer. He also says that is the reason he had to caulk her, the oakum having shrunk and become loose, and that he did so from the water-line up. Under the conditions he describes, he thinks one is liable when caulking only in certain places to dislodge the caulking elsewhere. He admits that he did not caulk the whole of the sides, but only where he thought she required it. Captain Robinson also relates that on a previous occasion, when laid up for two years, he had gone over and caulked her that way, and then had to keep the pumps going all the way up Lake Erie and until he got to Lake Michigan, when she began to tighten up a little. He says he "figured" on dry-docking her in 1915. She was sold, however, in March of that year, and put into the respondents' service. Two other witnesses speak of her repairs: Secord, superintendent of hulls for the respondents, and Jones, a ship-carpenter, also in the respondents' employ, who went over to Tonawanda to work on the repairs if needed, also gave evidence. Secord inspected the barge on the 25th February, 1915, and reported to Mr. Norcross, manager of the respondents' line. On his report, apparently, the purchase went through in March. He also accompanied Drake, inspector for the Great Lakes Register, on the 17th March, when the vessel was being inspected for classification. He did not test for leaking on the first occasion, but found that she required caulking in the top-sides and decks. His examination of the seams and butts was from the dock with a penknife, and no horsing or caulking was then done. The side below the dock, about 5 feet in depth, was not got at.

On the second occasion, Drake laid out to be done, caulking her top-sides, both bows and her deck, repairing hatch combings, and a new cat-head, but neither got down to inspect below the dock. These repairs were concluded on the 25th April, and

the loading was done, and the voyage begun, on the 2nd May—Secord says he would expect the first signs of weakness on the outside to appear in the frames forward between wind and water, i.e., between the light load-line and the covering board or top of the hull. He made notes during the inspection, but did not produce them. It must be observed as to this evidence that, if what Robinson had done had been effectual, Drake would hardly have required exactly the same work to be gone over anew. Drake did not inspect again, so far as Secord knew. Jones's evidence is to the effect that he saw men working on floats, horsing and caulking the outside; he "just looked round, tried some seams all round her top-sides, just where I could get around," and found the seams and caulking good. Haskell, the mate of the "Moravia," said he had experience of sailing on a boat immediately after being tied up for two winters and a summer, and that she would likely "make water mostly on the top-sides, what is above the water;" and, on being asked whether there was great danger of her making water on the top-sides, answered "Yes, they get dried right out there." He thinks her dryness after this accident was due to the fact that, her sides being in the water, her seams and butts had got soaked so that they took up the shrinking from dryness.

All these are the respondents' witnesses.

Edward Gaskin, called by the appellants, a marine architect surveyor with 46 years' experience, who represented an insurance company, examined the port side of the "Moravia" on the 8th May, and observed places where she had been caulked, and says he saw some places where there were threads of oakum hanging out of the seams, especially along the top-sides and amidships and one or two butts where the oakum was spewed out. He concluded from his observation that the boat had only been caulked where it was thought necessary. His view agrees as to the leaking caused by shrinkage when a vessel had been tied up for two winters and a summer, and that she would leak very badly and would "take up" completely in 2, 3, 4, or 5 days, and not appreciably in 4 or 5 hours. He also says that, unless caulking is done from stem to stern and in every seam, it cannot be made tight. A vessel that may not leak lying still will, he asserts, leak as soon as she gets in motion. If properly caulked, the vessel will not leak, but if she takes in water she is not properly caulked. He is not

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contradicted as to the question of leakage, and only inferentially on the other points, by the general but inconclusive opinions of the witnesses I have mentioned that the work on the vessel was good, and that consequently she was seaworthy.

Inspection by an independent person is nowhere proved. What is shewn is, that Secord went over the vessel inside and examined her by boring and poked at her sides outside with his knife, but no inspector is called, either after the first repairs were done, or those required by Drake, to pronounce on the vessel's condition.

The inspection by the Great Lakes Register was not made on behalf of the ship-owner, but for an insurance organisation for the purpose of classification, and adds nothing to the diligence of the owner. He has an interest in getting off as cheaply as he can, and compliance with the insurance demands is of no consequence on the point of seaworthiness, unless those demands are shewn to have been adequate and to have been actually and properly performed. I shall refer to this point again.

I think the proper conclusion from the evidence is that the vessel was not seaworthy, so far as this cargo of grain was concerned. "Seaworthiness" includes not only staunchness, i.e., being built to withstand the elements without injury to the hull, but also comprehends a condition which will likewise insure the safety of the cargo, both from perils of the sea as commonly understood, and from causes not accompanied by violence of the elements, such as leakage. "Where a ship, shortly after leaving port and without any apparent reason, sinks or leaks, the mere facts afford *prima facie* evidence of unseaworthiness which must be rebutted." Scrutton on Charterparties and Bills of Lading, 7th ed., p. 82. In other words, a grain cargo must be carried dry, and the seaworthiness of a vessel in relation thereto will depend upon her capacity in that respect.

Kennedy, L.J., in *Virginia Caroline Chemical Co. v. Norfolk and North American Steam Shipping Co.*, [1912] 1 K.B. 229, at pp. 243, 244, speaks of the law on this subject as unquestionable, "that there is in every contract with regard to the carriage of goods by sea an absolute warranty that the carrying vessel must, at the time of sailing with the goods, have that degree of fitness as regards both the safety of the ship and also of the safe carriage

of the cargo in the ship which an ordinarily careful and prudent owner would require his vessel to have at the commencement of the voyage, having regard to the probable circumstances of that voyage and its nature." See also *Steel v. State Line Steamship Co.*, 3 App. Cas. 72; *Rathbone Brothers & Co. v. D. MacIver Sons & Co.*, [1903] 2 K.B. 378.

This vessel was an old one—some 29 years old. On a previous occasion, she had been out of the water for a long period, and Captain Robinson says that, when he had gone over and caulked her in a way similar to that done on this occasion, he had to pump the vessel out, going up through Lake Erie, and until he got to Lake Michigan. She was then carrying, as appears from the evidence, coarse freight—coal or iron ore, neither of which would take any damage from water.

Captain Robinson was also contemplating dry-docking her in 1915, no doubt pursuant to the Great Lakes Register, the rules of which require dry-docking every two years and a half for wooden vessels, and also presumably in accordance with his experience. No vessel can be examined under water, where the hole was discovered, unless careened or dry-docked.

At the time of the sale to the respondents, the vessel had been laid up for two winters and a summer. She was twice caulked—once at the request of the purchasers or perhaps for the purpose of selling her, and on the second occasion in order to comply with the Great Lakes Register requirements. She was not dry-docked. She was not inspected below the water-line on either occasion; and there is no person, either interested or disinterested, who is willing to risk his reputation in pronouncing her completely seaworthy. The opinions given are always qualified either from lack of proper observation or to the best of the witnesses' knowledge. The repairs, such as they were, were completed on the 25th April, while the certificate of classification by the Great Lakes Register bears date the 7th April, 1915, so that it was clearly given before the repairs directed to be made were completed. This in itself would prevent a certificate issued by the Great Lakes Register from being any evidence at all upon the question, even if such a certificate could carry any weight in the determination of a question of fact, in the absence of the inspector who actually saw the vessel, examined her defects, and finally passed her

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as having had them remedied. What is undeniable is, that Drake, the surveyor for the Register, on the 27th March, 1915, found that this vessel needed both bows caulked and top-sides from light water-mark to covering board, and that no one was called to shew that it had been done to the satisfaction of anybody. The certificate given, which states that the vessel had been inspected by the Great Lakes Register, and was reported *to be in a good and efficient state, fit to carry dry and perishable cargoes, on the 27th March, 1915*, was untrue. That these repairs were needed is self-evident, and there is no satisfactory evidence that they were ever properly done. A good deal of stress was laid, and properly so, on the existence of a definite "hog" in this vessel. Its danger is explained, and it cannot be said that a ship which, unless loaded with extreme care, will leak and damage a grain cargo, is in a seaworthy condition. It is only conditionally so. But the fact, while important, is supplemented by no positive evidence that the loading was not carefully done. It emphasises the importance of dry-docking to see whether the seams had opened during the seven years, or the frame had been strained, and adds an additional and plausible cause for the excessive inflow of water immediately after the loading and movement of the ship.

The onus of shewing seaworthiness in the case of a vessel is upon the ship-owner, especially when the vessel is found to be leaking badly within 10 or 15 minutes after she leaves the dock. The case is not unlike that of *Anderson v. Morice*, L.R. 10 C.P. 58, already referred to, where Mr. Justice Brett, in pronouncing the judgment of the Court, treats the sinking of a vessel in smooth water, very shortly after the attaching of the policy, as shifting the burden of proof, and a fact not to be displaced by mere opinion founded on conjecture.

Having regard to the foregoing, and also to the evidence already referred to of Gaskin as to the condition in which he found the vessel on the 8th May with regard to caulking and the condition of her seams and butts, it is important to note the evidence as to the rise of the water in the vessel.

If the view of the learned trial Judge is accepted in so far as he finds that there was a hole caused by the ship coming into collision with the dock, then how does it leave the matter?

It is, I think, almost impossible to follow the mathematical



calculations made as to the inflow through that hole, but certainly the amount of water that percolated through into the vessel in the short space of time—half an hour—seems to be very large if due to a hole such as is described, operative only for the last 15 minutes. There is great difficulty, where the hole is irregular in shape, and rather resembles a funnel, in estimating exactly what the flow per second or per minute through it will be, especially when the vessel is travelling through the water and not standing still to receive the inflow. I should not be disposed to place a great deal of reliance upon the results obtained by mathematical calculation as to it, as it turns out that the water taken in while loading, had doubled in height in 10 or 15 minutes, by the time the vessel got to or just past the corner of the dock, while they were only quadrupled in the next 10 or 15 minutes, when the hole as well as the seams and butts were at work. There must be something to account for the rapid rise of the water after leaving the loading berth, and before any accident can have happened; and I think it is a not unreasonable inference that the leakage which had produced the extra foot of water in the first 10 or 15 minutes was then reinforced by the water through the hole, the effects of which began to tell. Both causes therefore resulted in causing the damage to the grain. If so, the hole, however made, was not the whole reason for that damage, but unseaworthiness was an efficient cause, and had begun to allow its consequences to take effect on the cargo before the second element arose to complete the work. It is, of course, impossible to determine the relative effects during the first and second quarter hours, and no attempt was made to do so. If unseaworthiness operated directly, the damage agreed upon must be attributed to it at first, and then to both causes acting together. The effect of the statute I shall consider later.

I do not want to overlook the fact which is urged that on subsequent trips the vessel was dry. We have, however, few details about those subsequent trips; but, taking Captain Robinson's experience of the earlier trip he made up Lake Erie and into Lake Michigan, it would appear that, after he got to Lake Michigan, the vessel had "taken up," as it is called, and that she did not leak again during the season. Applying that in this case, it is a fair inference to say that between the 2nd May, when the cargo was

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taken on, and the 8th or 10th May, when the repairs were done, a similar taking up should have occurred, as the vessel was in the water for apparently just about the same length of time as would be needed to traverse Lake Erie and get up through the Detroit river and Lake St. Clair into Lake Michigan. So that the experience of the season of 1915, after the repairs had been made, and the vessel's seams and butts had been swollen tight by immersion in the water, would fit in exactly with what had resulted previously from immersion under similar conditions after two years' dryness.

This comparison is not discussed by the learned trial Judge, and it goes without saying that the absence of leakage before the 2nd May is beside the question, as the top-sides were never under water, and after the 10th May must be viewed in the light of the only proved incident in this vessel's experience.

The vessel had not been dry-docked, although admittedly that should have been done every two years, or two years and a half, and the respondents were aware of that fact when the vessel was purchased, as the point was put to Captain Robinson, who told Secord. The evidence of all those who have spoken admits that drying up would be an inevitable consequence of the ship being laid up and out of the water for such a length of time. The only evidence of care taken or of due diligence is the very sketchy and unsatisfactory evidence of Captain Secord, against which is placed the fact that what had been done at his request had to be done over again for Drake, and that no proof was given, except that of Captain Robinson, that Drake's requirements had been complied with, or that, if complied with, they had made the ship seaworthy so far as cargo was concerned. I have already given his evasive answers on this point.

Upon the result of all this evidence, I cannot find due diligence in regard to seaworthiness, nor seaworthiness itself. To my idea, the words "exercises due diligence" must be taken in a reasonable sense, and mean something substantial. The ship-owner warrants the seaworthiness, and the seaworthiness is a necessary condition of the carriage. Its absence, as has already been pointed out, increases the danger from the perils mentioned in sec. 6, and I read "exercises due diligence to make the ship in all respects seaworthy" as meaning not merely a praiseworthy or sincere, though

unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so, as far as diligence can secure it.

Looking at the case in the light of the foregoing, what is the effect of the sections in the statute which have been so strongly pressed? Those sections are as follows:—

“6. If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defects.

“7. The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters . . . or for loss arising without their actual fault or privity or without fault or neglect of their agents, servants or employees.”

For the reasons I have given, I am unable to find that the owner had exercised due diligence to make the ship in all respects seaworthy; and, if the loss or damage was caused wholly or partly by the hole made owing to the collision with the dock, the evidence leads to the conclusion that the damage resulted from fault or error in navigation or in managing the ship; and, the ship not being seaworthy, and the owner not having shewn due diligence to make it so, he would not be protected.

This, I take it, is the meaning of sec. 6.

The velocity of the wind, as shewn in exhibit 16, on the 2nd May at Long Point, was only 5 miles an hour, and westerly; and it is very difficult to understand how a vessel laden with 46,949 bushels of wheat, in tow of a tug and being steered, could be blown against the side of a dock in a slip 200 feet wide, especially as she started from the north-west corner of the dock, and so had the whole width of the dock to manœuvre in before turning the corner, which is at the south-east angle. The explanation, I think, if the vessel struck the dock at all, is that it was due to an error of navigation or management of the vessel. Francis, who was the captain of the barge, was steering it, and he admits that from his position in the wheel-house at the stern he could see

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neither the vessel that was towing the barge, nor the dock. He was practically steering blindly and without a compass. Although there were both a mate and other men on the barge who were called as witnesses, no attempt was made to shew that they assisted the captain in his steering by signals or otherwise, and their evidence is also extremely unsatisfactory.

No one, under these circumstances, could very well conclude that the collision was an accident. I myself, for reasons I shall point out, doubt whether the barge struck the dock at all. But, as the learned trial Judge is inclined to think that is what happened, I deal with it first as a fact; and, on that assumption, negligent navigation is the view of the learned trial Judge himself. If unseaworthiness exists in fact or want of due diligence in that direction is shewn, the statute gives no help to the ship-owner in case of negligent navigation.

Under sec. 7, however, there is more difficulty. Under it the owners are not to be held liable for loss "arising from . . . dangers of the sea or other navigable waters . . . or for loss arising without their actual fault or privity or without fault or neglect of their agents, servants or employees." The difference between it and the corresponding section of the English Act should be noted. Section 502 of the Imperial Merchant Shipping Act absolves the owner from loss happening without his actual fault or privity where goods are lost by fire. Section 503 likewise absolves him to a limited extent where certain occurrences take place also without his actual fault or privity; i.e., loss of life of a person carried and damage or loss to goods on board, etc.

The Canadian Act places the owner's personal fault as a cause of loss in the same category as dangers of the sea, inherent defects, deviations, and many other causes. The English Act makes the absence of personal fault a condition of non-liability. The Canadian Act does not. The difference is substantial, but it seems to rest broadly on the fact that the losses provided for under sec. 7 are those which do not arise from within, so to speak, such as negligent navigation, and improper management, as these are faults of the captain and crew, or latent defects, which are faults of the ship itself. These, under sec. 6, if the ship is seaworthy or the owner has been diligent in that respect, do not render the owner liable. But under sec. 7 causes operating from persons

outside and unidentified with the ship or crew or those not arising from negligence are sufficient to free the owner, and in the same way the absence of any personal fault in himself renders him immune.

What, therefore, has to be shewn in this case by the ship-owner, under this section, is that the loss occurred from a danger of the sea or arose without his actual fault or privity or that of his agents, servants or employees. In view of the contract of carriage and the warranty of seaworthiness, and applying the case already mentioned, (*Lennard's case*), the onus is on him to bring himself within the exceptions.

There is no doubt that, if the hole was made by striking the dock, owing to bad steering, then it was not caused by a peril of the sea. Striking a rock or being struck by another vessel without fault is a peril of the sea. See *Cluxton v. Dickson* (1876), 27 U.C.C.P. 170. But there is in such a case always the proviso that the vessel itself must not have been at fault: *Wilson Sons & Co. v. Owners of Cargo per The "Xantho"* (1887), 12 App. Cas. 503; *British and Burmese Steam Navigation Co. v. Liverpool and London War Risks Insurance Association* (1917), 34 Times L.R. 140.

Here the learned trial Judge has found that the hole was probably caused by collision with the dock. The dilemma in which I think the respondents are put is, that all their evidence is directed to prove striking the dock, and that, even if it fails entirely to convince, it negatives any other cause and leaves only two alternatives, one of which is to draw a conclusion, quite opposed to the evidence and against the view accepted by the trial Judge, and the other is to accept the evidence of men who have obviously not told the truth at one time or other, namely, in their statements made on the 4th and 10th May or at the trial. The change in their testimony must be read in the light of the fact that the appearance of fish through the pumps, if true, was known when the protest was made.

In other words, to find a peril of the sea one must disregard the sworn statements and marine protest, and accept the second thought of one seaman, who, at the trial on cross-examination, suggests a sunken log, and on that make a finding contrary to the learned Judge's view.

The difficulty in arriving at the conclusion that the injury to

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the vessel was caused by a projecting bolt on the pier, is to be found in the circumstances deposed to. The surface of the dock above and for 3 feet below the water-line is smooth concrete, with a wooden stringer 2 feet above the water-line. Below the water, the cement rests on cribs made of timber 12 by 12 inches, fastened with bolts, the heads of which were countersunk. The projection of the two or three bolt-heads, discovered by the diver 25 feet from the angle of the dock, was only 1 inch to  $1\frac{1}{4}$  inch. Leaving aside the fact that there was a wooden stringer 2 feet above the water-line, probably 5 inches deep, the projection of an inch or  $1\frac{1}{4}$  inch would be quite insufficient to cause any such effect as a hole, if it had the shape and the size described by the respondents' witnesses.

It appears that, shortly after the occurrence which gave rise to this action, the usual marine protest, dated the 10th May, was made and signed by the captain and mate of the barge, namely, Francis and Hassell, which contains the statement that in leaving the dock the ship struck the corner of the dock heavily, and that, upon examination of the ship when unloaded, it was found that one of the hull-planks on the side of the vessel amidships had been torn and crushed by contact with the dock. In this there is nothing stated as to the wind having blown the vessel against the dock.

Shortly before that protest was made, on the 4th May, both the captain and mate had given statements to Mr. Essery, a lawyer of Buffalo, who had come down in the interest of the insurance company. In the statement of Captain Francis appears the following: "The wind was blowing fresh from the south-west, striking us on the starboard bow. The tug took the line which ran out over the bow, about on a line with the keel, and stood off to starboard to hold us away from the eastern pier. When we were about half-way out of the slip the tug was unable to hold us and we struck the corner of the eastern pier, which is of concrete, about midships. The line did not break, but the wind was too strong and the barge too heavy for the tug to hold us." Haskell's statement at the same time is: "The wind was blowing fresh from the south-west, striking us pretty well broadside on the starboard side. The tug stood pretty well over to starboard of us to hold us away from the pier. The tug was unable or did not hold us,



and, when about half-way out of the slip, we struck the corner of the eastern pier, hitting us about midships."

Brown, one of the crew, who was taking the soundings, also made a statement at that time as follows: "The wind was blowing fresh from the south-west, striking us almost broadside on the starboard bow. We struck about midships on the port side with considerable force." In none of these statements is it suggested that a bolt penetrated the vessel, but that the seams started. This indicates that the leakage was, until the hole was discovered, attributed wholly to opening of the seams from a bump.

These witnesses, on cross-examination, quite receded from the position that a heavy blow was struck, none of them having noticed any tremor of the vessel or being aware of the collision, and declining responsibility for the statements as made.

The captain, Francis, puts the vessel as having come about 5 to 10 feet from the corner of the dock, but admits that he could not see the dock, and he is not able to swear that the "Moravia" struck the dock at all, and thinks he would have known it had she struck the dock heavily. Indeed, he adds, if heavily, it would break her in two, but that he figured she must have struck somewhere on the corner of the dock. He cannot remember about the wind, but thinks she must have struck something.

Haskell says the wind was blowing south-west, and that he should judge the barge came about 7 feet from the dock. He will not say that she struck the wharf, and gives it now as his idea that something was floating or sticking up or projecting from the dock. It looks very much as if these witnesses, for some reason, possibly because they thought it would indicate negligent navigation or because the statute offered a better defence, changed their versions at the time of the trial, or perhaps because Captain Julian, the captain of the tug, swore at the opening of the trial, and before they were called, that the barge had never been closer to the dock than 50 feet; that the weather was all right and calm; and that they were going out of the dock at the rate of only 2 miles an hour

If the evidence renders it doubtful whether the collision with the dock was the cause of the hole, is there anything in the evidence warranting this Court finding that the vessel struck a submerged object of such shape as to cause the injury described?

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There is nothing but the description of the hole to suggest such a cause, and that description rests wholly on the testimony of employees of the respondents, who took no precaution to secure independent inspection of what they had discovered before they hastily repaired it. I admit that there are cases where an inference is not only possible, but where it is absolutely necessary to draw one if the case is to be decided at all. But when the onus is on the ship-owner and he is driven to ask the Court to discard all his evidence in order to presume a fact in his favour, so as to satisfy a statutory onus, I think he is asking more than the Court ought to grant.

In this case, however, even on the assumption that the hole was made by a sunken log or other object, while it would be, I think, properly described as a danger of the sea, it would not be the sole cause. If the vessel were not seaworthy, and the cargo were damaged by the leaking in of water before this supposed object was struck, it would be impossible to separate that loss from the loss caused by the knocking of the hole through the vessel's side, because, had that not happened, the evidence leads to the conclusion that the same damage would have occurred during the first few days of the voyage, though not so quickly. The loss, in other words, cannot be separated from the unseaworthiness; and it cannot be said here that that element in the cause existed without actual fault or privity of the owner. If, however, it were capable of separation then as to the condition of unseaworthiness, produced solely by a peril of the sea, that would, under sec. 7, be something for which the owner is not liable. But, apart from the difficulty of disentangling one from the other, the barge's condition was reported by Captain Secord to Mr. Norcross, the manager of the respondents, who was not called to deny knowledge. The classification of the vessel necessitated another inspection, and it is not too much to say that the class in which she was put was a matter of importance and sure to be known to the manager. I think, however, that Secord, the inspector of hulls for the respondents, is properly identified with the owners as being the person whose duty, according to his evidence, was to make inspections for the respondents, and the person on whose inspection the purchase was completed. It is not an unfair inference that the respondents must have had full know-

ledge of the condition of the vessel before they decided to pay \$5,000 for it. Under this section (7), and under the cases I have already mentioned, the onus is upon the owner; and it has not been proved, in my judgment, that the loss has wholly arisen from a danger of the sea or without the fault or privity of the owner. It may have so arisen, but the onus cast upon the respondents is one which they must meet, and it is not enough that the circumstances point that way, unless it be established by them as having actually so occurred or as being the only reasonable conclusion under the proved circumstances, because the statute only absolves them from liability in case they satisfy that condition. The vessel had been in the ice for two winters, and in the water for one summer, and the hole may have been made by some other means than those suggested. At all events, in the absence of any inspection under water since 1908, the exact origin of the hole is, upon the evidence, a matter of very considerable doubt. No argument was addressed to us on the effect of the bill of lading, and consequently I have not considered it.

For these reasons, I think the appeal should be allowed, and judgment should be entered for the appellants for the amount agreed upon as the damages suffered by them. The respondents should pay the costs of the action and of the appeal.

MEREDITH, C.J.O., and MACLAREN and MAGEE, J.J.A., agreed in the result stated by HODGINS, J.A.

FERGUSON, J.A. (dissenting):—This is an appeal from the judgment of Middleton, J., dated the 24th January, 1917, dismissing the plaintiffs' action with costs.

The circumstances out of which this action arose are fully stated in the opinion of the learned trial Judge.

The learned trial Judge dismissed the action on the ground that the defendants had established the seaworthiness of their ship, and were therefore entitled to the benefit of sec. 6 of the Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61, and of sec. 964 of the Canada Shipping Act, R.S.C. 1906, ch. 113.

The judgment is attacked on the following grounds:—

(a) The evidence does not support a finding that the defendants' ship, the "Moravia," was, at the commencement of her

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voyage, "seaworthy," or that the accident which caused the hole in the ship's hull occurred after the vessel left the dock, and was not the result of negligence other than error in navigation or mismanagement of the ship.

(b) That there must be affirmative evidence and a finding of (1) seaworthiness and (2) that the accident occurred by reason of error in navigation or mismanagement of the ship, or peril of the sea, before the defendants can be given the benefit of the provisions of the Water-Carriage of Goods Act, or the provisions of the Merchant Shipping Act.

(c) That the learned trial Judge has not found seaworthiness or how the accident occurred.

(d) That, if the learned trial Judge has in fact found seaworthiness, he has based his finding on an erroneous view as to what is sufficient evidence to prove seaworthiness.

The inflow of water which caused the damage to the cargo appeared almost immediately after the "Moravia" started her voyage; and, under such circumstances, the onus was on the steamship company to shew that the ship was, at the time she commenced her voyage, seaworthy: *Pickup v. Thames Insurance Co.*, 3 Q.B.D. 594; *Lindsay v. Klein*, [1911] A.C. 194, at p. 204.

The defendants endeavoured to satisfy this onus by giving evidence of work done and repairs made, followed by inspection and report of competent surveyors, and by giving evidence to shew that the damage occurred by reason of a hole in the hull of the boat, made after the boat commenced her voyage.

As the appellants contend that the findings of fact are not sufficient to support the judgment, I quote from the opinion, the following:—

"The defendants have shewn that the boat was overhauled and put in good shape by competent and experienced men—she was inspected for the underwriters' grading—but the officer who inspected her was not called by either party. I think it would have been more satisfactory if he had been called.

"The evidence of this inspection and overhauling and the fact that, after this hole had been repaired, the boat did not leak, convince me that the hole was the cause of the damage. I think steam pumps could have cared for the leakage apart from this.

"How the hole came to be made is not very satisfactorily shewn.

"These being my findings of fact, the case is brought within sec. 6 of the Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61.

"The inspection and repair, including the caulking of the seams, was, I think, due diligence to make the ship seaworthy, and the damage resulted from some fault or error in navigation or the management of the ship, if the hole was the result of the collision with the dock. If from some unknown obstacle, then the hole was made without negligence—and was a peril of navigation.

"The provisions of the Merchant Shipping Act also afford a defence."

The findings of fact in the foregoing statement hinged upon the credibility or effect of evidence given orally by witnesses, and this is not one of those extraordinary cases mentioned in *Wood v. Haines* (1917), 38 O.L.R. 583, 33 D.L.R. 166, in which an appellate Court would be justified in differing from the opinion of the trial Judge. In my opinion, the findings of fact are amply supported by the evidence, and the judgment should stand unless it is shewn that the learned trial Judge, in drawing his conclusions, misapprehended or misapplied the law.

It is urged that the learned trial Judge was of the opinion that evidence of repairs, work, and the employment of competent persons to do the work of fitting up the boat and making her seaworthy, coupled with a subsequent inspection by competent surveyors, was sufficient evidence of due diligence on the part of the ship-owners within the meaning of the Water-Carriage of Goods Act, whereas due diligence, as interpreted by the authorities, is not made out by such evidence, but that the duty of the defendants to provide a seaworthy ship was absolute except as to latent defects; that, when they entered into the contract to ship the grain, they warranted the fitness of the ship when she sailed, and not merely that they had honestly and *bonâ fide* endeavoured to make her fit. This statement of the law seems to be correct: *Dobell & Co. v. Steamship Rossmore Co.*, [1895] 2 Q.B. 408; *McFadden v. Blue Star Line*, [1905] 1 K.B. 697, 707; Halsbury's Laws of

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England, vol. 26, p. 216; and, were I of the opinion that the learned trial Judge had based his finding of seaworthiness on that evidence only, or that the learned Judge did not intend to say that the ship was absolutely seaworthy, but only that the defendants had made honest, *bonâ fide*, and reasonable endeavour to make her seaworthy, I should be obliged to give effect to the appellants' contention that he had misapprehended the law.

To give point to his argument, counsel for the appellants picked from the learned Judge's reasons, the following statement: "The inspection and repair, including the caulking of the seams, was, I think, due diligence to make the ship seaworthy;" but I do not think that we can arrive at a fair or true interpretation of the opinion by separating this sentence from the other findings. We must read the opinion as a whole; and, when it is read as a whole and considered with the evidence, it seems to me to have been established to the satisfaction of the learned trial Judge that, during the time the vessel was loading, she did not leak appreciably; that the flooding commenced after the boat left the dock; that, after the hole was closed by repair, the vessel, on all her future voyages during the season, proved seaworthy, from which the inference is irresistible that the boat was in every way seaworthy when she left the dock, and that, I think, is the effect of the findings.

At the opening of the trial, the plaintiffs' counsel stated the issue to be whether or not the ship was unseaworthy when she was loaded and when she started her voyage. The evidence of the plaintiff was directed to shewing that she was an old vessel, not sufficiently caulked in her seams, and so hogged in her keel that when she was loaded her seams would open. The evidence of the defendants was directed to shewing that she was properly caulked, and that the flooding did not occur in the ways suggested by the plaintiffs, but by reason of the hole. These were the real issues presented to the trial Judge for consideration; and to interpret his reasons for judgment as not in fact finding seaworthiness or unseaworthiness is to say that he misapprehended the case he had to try. If the ship was seaworthy and properly manned, equipped and supplied, the defendants are not responsible for the loss or damage resulting from fault or errors in navigation or in the management of the ship, or from the dangers of the sea or



other navigable waters. See the Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61.

The learned trial Judge appears to be of the opinion that the hole was made by the boat being blown against the corner of the Maple Leaf dock, or by the boat coming in contact with a projecting bolt-head in the cribs. If the injury was caused in either of these ways, the defendants would, under the wording of the Act, be free from liability. It is, however, urged that the hole may have been caused by other fault or neglect of the defendants, or their agents, and that the onus was on the defendants to prove that it was not so caused. This would put upon the defendants the onus of proving a negative. This question of onus is discussed in *Ingram & Royle Limited v. Services Maritimes du Tréport Limited*, [1914] 1 K.B. 541, at p. 549; but the point was not settled because there the Judges differed in their opinions. On principle it is not unreasonable to call upon a party to prove a negative where, as here, the facts are peculiarly within the knowledge of that party; and, for that reason, I think, we must consider the evidence to see whether or not it is reasonably established that the hole was caused by error in navigation, mismanagement, or peril of the sea.

There is no evidence to suggest in what way the hole might have been made, by fault of the defendants or their servants other than by faults or errors in navigation; and, although the defendants have not in this case affirmatively established how the hole was made, they have, I think, in the circumstances, established that it could not have been made except by causes covered by the words of the Act:—

"6. If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship or from latent defects.

"7. The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters . . . or for loss arising without their actual fault or privity or without fault or neglect of their agents, servants or employees."

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The learned trial Judge was unable to say exactly how the hole was made, and I am unable to say, but I think the only reasonable inference from the evidence is that it was occasioned in either of the ways stated by the learned trial Judge. See *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72; *British and Burmese Steam Navigation Co. v. Liverpool and London War Risks Insurance Association*, 34 Times L.R. 140. If it was made in either of these ways, the defendants are not liable.

For these reasons, I think the appeal fails, and should be dismissed with costs.

*Appeal allowed* (FERGUSON, J.A., dissenting).

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[APPELLATE DIVISION.]

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*Contract—Sale and Delivery of Goods—Specifications—Times for Delivery—Instalments—"Current Contract"—Oral Evidence—Statute of Frauds—Breach of Contract—Repudiation—What Amounts to—Right to Rescind—Damages—Finding of Trial Judge—Appeal.*

On the 23rd December, 1915, a contract was made for the sale and delivery by the defendant to the plaintiff of 1,000 tons of Hamilton pig-iron; and on the 25th September, 1916, another contract for 1,200 tons. The contracts were on printed forms, and it was a term of both that "all specifications are to be sent by buyer at least 15 days before time fixed for shipment." In the earlier contract the time for delivery was stated to be "between date of completion of current contract and June 30th, 1916, in equal monthly instalments;" and in the later contract, "in about equal monthly instalments between January 1 and June 30, 1917." None of the iron which was the subject of the contract of December, 1915, had been delivered; and the defendant set up, in answer to a claim for damages for breach, that the plaintiff had lost its right to have the iron delivered because of failure to send specifications in due time:—

*Held*, that what was meant by "current contract" might be shewn by parol evidence; it was established that, while there were two earlier contracts, the reference was to that of January, 1914, the only contract under which deliveries were being made in December, 1915, or under which the plaintiff was then entitled to have deliveries made; and the finding of the trial Judge that the plaintiff had supplied specifications for all the iron it had bought from the defendant, and that it was well understood by both parties that the specifications which had been supplied were to govern as to all the iron, unless the plaintiff should desire to vary them and send other specifications, was warranted by the evidence, and was sufficient to dispose of the contention of the defendant adversely to it.

The plaintiff also sought damages for breach of the contract of September, 1916, alleging that, although the time for commencing deliveries had not arrived, the defendant had, before the action was begun, repudiated the contract. The dispute as to this contract arose out of the controversy

between the parties as to the contract of December, 1915, the plaintiff insisting on deliveries being made under it, and the defendant taking the position that it had ceased to exist. The defendant declared that it would make no deliveries under the contract of September, 1916, until that question was settled:—

*Held*, that, whether this meant that, unless the plaintiff would formally abandon its contention with regard to the earlier contract, no deliveries would be made under the later one, or that it would make no deliveries under the later contract until the dispute as to the earlier one was settled, there was such a repudiation of the defendant's obligation under the later contract as warranted the plaintiff in rescinding.

*In re Rubel Bronze and Metal Co. Limited and Vos*, [1918] 1 K.B. 315, and *Metropolitan Water Board v. Dick Kerr and Co. Limited*, [1918] A.C. 119, applied.

*Held*, as to damages, that, as what the defendant had agreed to sell was Hamilton pig-iron, and the market price of it was \$39, the plaintiff was entitled to recover the difference between that price and the contract price, even if other iron which would answer the same purpose could be bought at \$34.

Judgment of MIDDLETON, J., affirmed.

AN action by the buyer against the seller for damages for failure to deliver pig-iron under two separate written contracts.

October 12, 1917. The action was tried by MIDDLETON, J., without a jury, at a Toronto sittings.

*R. S. Robertson*, for the plaintiff company.

*George Lynch-Staunton*, K.C., for the defendant company.

October 26, 1917. MIDDLETON, J.:—The defendant company manufactures pig-iron at Hamilton. The plaintiff company manufactures steam and hot water radiators at Toronto, and in the course of its business requires large quantities of pig-iron.

For many years the plaintiff has purchased from the defendant and from its predecessor, the Hamilton Steel and Iron Company Limited, a large portion of the iron required—the course of dealing being that a series of contracts were entered into calling for the delivery of a given quantity of iron at a specified price within a named time. I shall not need to refer to more than four of these in any detail.

*First*, a contract of the 14th January, 1914, which called for 2,000 tons to be delivered between its date and the 30th June, 1914.

The deliveries under this contract were made between the 5th December, 1914, and the 12th January, 1916.

*Second*, a contract of the 14th October, 1915, which called for 1,000 tons “in about equal monthly instalments between date of completion of current contract and June 30th, 1916.”

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The current contract referred to is that of January, 1914, under which delivery was completed on the 12th January, 1916. Delivery under this contract began on the 12th January, 1916, and ended on the 1st December, 1916.

It should be mentioned that the course followed was to make delivery of lots consisting of one or more car-loads (some 30 tons per car) and to send invoices attributing the shipment to a particular contract. When there only remained a small quantity upon any particular contract, a full car was sent, but two invoices—one to complete the earlier contract and another to begin the new: e.g., on the 12th January, 1916, a car contained 7 tons 1,110 lbs. to complete the January, 1914, contract, and 23 tons 590 lbs. on account of the contract of October, 1915.

*Third*, a contract of the 23rd December, 1915, which called for 1,000 tons "to be delivered between date of completion of current contract and June 30th, 1916, in equal monthly instalments."

This is the first contract sued upon.

Upon the argument before me it was assumed that the "current contract" referred to was the contract of October, 1915, and much ingenuity was displayed in attempting to give meaning to the words quoted.

The "current contract" was, in my view, the contract of January, 1914, under which about 150 tons then remained to be delivered, and which was not completed until the 12th January, 1916.

The interpretation I give makes the situation easily understood. A contract made in January, 1914, for 2,000 tons was nearing completion, and a new contract was made in October, 1915, for 1,000 tons. In December, while the 1914 contract was still current, the plaintiff decided to take another 1,000 tons, and made the contract of the 23rd December. The October and December contracts both called for delivery between the completion of the 1914 contract and the 30th June, 1916. So what was done was to provide for the delivery of 2,000 tons in this period, 1,000 under the October contract, being at \$19.63 per ton; 1,000 under the December contract, being at \$22.88 per ton.

*Fourth*, the last contract was on the 25th September, 1916, and called for the delivery of 1,200 tons between the 1st January and the 30th June, 1917, at \$23.88 per ton.

Between the making of this contract and the 1st January, 1917, the price of pig-iron advanced with great rapidity, and the demand exceeded the supply—"Hamilton Pig," i.e., the iron of the defendant's manufacture, selling, as admitted by its counsel, at \$39 and upwards.

All the contracts are upon forms prepared by the vendor; and, though orders were solicited and sent in by the purchaser, these were not accepted but used as the basis for preparing formal contracts signed by the parties.

Under these contracts, the vendor is to be excused from delay due or partly due to accidents to machinery, etc., and contingencies beyond its control. If the delay extends beyond one month, the purchaser may give notice, within 10 days after the 30 days, of its desire to cancel, and if delivery is not then made it may then cancel that month's shipment. If the purchaser does not exercise this right the vendor may deliver in a reasonable time after the cause of delay has been removed.

As will be very apparent from the details already given, delivery was, in the case of the contracts referred to of January, 1914, and October, 1915, far behind the dates named. There may or may not have been valid excuses entitling the vendor to this delay, but the attitude of the parties was one of good-natured accommodation—the purchaser generally seeking for delivery more rapidly than the vendor was able to ship.

Under the earlier contracts the same situation existed.

A statement put in by the defendant (as exhibit 56) shews the dates during which its furnaces were shut down; and this, no doubt, to some extent, if not entirely, justifies its delay.

The situation then was that under the two contracts similar in their terms (save only as to price) the defendant was bound to deliver and the plaintiff to accept 2,200 tons between the completion of the January, 1914, contract, in January, 1916, and the 30th June, 1916—less than 6 months.

As already pointed out, the January, 1914, contract called for the delivery of 2,000 tons between January and June, 1914; but, by reason of former contracts not having been completed, delivery under it was not begun until December, 1914, and was not then completed in 6 months but in over 13.

When delivery began in January, 1916, the vendor sent in-

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voices attributing the iron to the earlier and lower-priced contract, and the purchaser did not object. Delivery was not made as promptly as it should have been, even if the contracts had only called for 1,000 tons, as this quantity was delivered from time to time over the year 1916.

When delivery under this contract was nearing completion, an invoice was sent, on the 14th November, for a car containing 28 tons 300 lbs., charged at the price of the December, 1915, contract. This is said to have been a clerical error, and a corrected invoice was sent by which the charge is changed to the price of the October contract. I do not attach any importance to this occurrence.

On the 1st December, 1916, three car-loads were forwarded; and as, at this time, only 7 tons 1,530 lbs. remained undelivered on the contract of the 14th October, 1915, the invoices charged this amount to that contract, and the balance was charged to the contract of the 25th September, 1916. On the 5th December, 1916, three further car-loads were sent and charged to the same contract.

The delivery under this contract was not to start until January, and the plaintiff assumed that the charging of this iron to this particular contract and the ignoring of the contract of December, 1915, which had never been mentioned in the meantime, was a clerical error.

Acting on this theory, a letter was written on the 12th December, pointing out the assumed error and asking that the iron be applied upon the contract of December, 1915, and that corrected invoices be sent.

On the 18th December, 1916, a letter was sent by the defendant saying that the invoices "are correct, as the contract they were applied against is the only pig-iron contract we have with you at this date. The contract you refer to was never in force, it having been automatically cancelled through your failure to recognise its conditions by exercising the privileges contained therein to which you were entitled prior to its expiration date, viz., June 30th, 1916."

Other correspondence followed, which must be reviewed in connection with the alleged breach of the September, 1916, contract, but it throws no light upon the question now under consideration. It is enough to say that this position was adhered to, despite the protests of the plaintiff.



To understand the position taken by the defendant, it is necessary to refer to certain terms of the contract not yet mentioned, and also to explain their significance.

In the form of contract there are blank spaces for "Material," "Quantity," "Specification," "Time of delivery," "Place of delivery," "Price," and "Terms."

All of these are filled in by the vendor when the contract is sent forward for signature by the purchaser.

"Specification," as applied to pig-iron, refers to the chemical analysis of the iron. The important elements of the analysis are the percentage of silicon, sulphur, phosphorus, and manganese present. The quantity of these elements affects the quality of the iron, and renders it more or less suited for the particular purpose for which it is to be used.

In the manufacture of pig-iron the different runs from the furnace are analysed, and an endeavour is made to distribute the iron so that each customer will receive that suited to his need. The exact analysis of any particular run depends, of course, upon the ingredients put into the furnace, but it is not possible to determine in advance with absolute precision what the analysis will be. This shews the importance to the vendor of having the specifications of the purchaser in his hands—without these he does not know what the purchaser desires.

On the other hand, the purchaser finds some variation in his needs. He may require iron with more than the usual silicon to mix with soft iron and so give to his mixture the requisite hardness.

So the contract provides, in the written portion, "Specification to follow," and in the printed clauses there is found the provision, "All specifications are to be sent by buyer at least 15 days before time fixed for shipment." It is because no specifications were sent in, expressly referring to this contract, that the vendor now contends that it came to an end automatically.

In the course of dealing between these two companies, there had been established a standard specification which fixed the maximum and minimum of the named elements, and only occasionally was there any departure from this. This was generally when the vendor delivered pig-iron with a low silicon content at times much below the minimum of the specification, when a demand would be made for some with a high silicon content to restore the

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average; but there was not, under any of the contracts, a new start made and a formal sending on of specifications; nearly all the communications of late were by telephone, and it was well understood what was required, and each invoice stated what was sent, and any change desired was intimated over the telephone. The supply was continued after the termination of what I call the current contract, and the information on hand and given in this way was accepted as a specification, and during the whole year in which iron was sent forward there was nothing to indicate that there was any desire for further specification. The vendor did not deliver by the time limited even the first 1,000 tons, and the purchaser was pressing; the delay was possibly not the vendor's fault, and probably the elastic terms of the contract would excuse the delay; but no good purpose would have been served by sending any specification before the 30th June under the second of these contracts, when the vendor could not meet the demands under the first.

On this branch of the case, I think I ought to find that the parties by their conduct acquiesced in the postponement of the contract in question until the vendor had completed delivery under the contract of October, 1915.

And, secondly, that the parties waived the delivery of any specification, and agreed that the iron should be according to the standard specification established between them, save when varied by special instructions given from time to time by the purchaser.

And, thirdly, that the vendor repudiated and so rendered itself liable to an action for refusal to deliver before the time of specification had arrived, having regard to my first finding.

And, fourthly, that time was not originally of the essence of the contract, and, even if it was, the parties by their conduct waived this.

Whatever the rights of the parties were as to the contract just considered, there does not seem to have been any room for question as to the position under the contract of the 25th September, 1916, calling for delivery in January, 1917—a dispute, *bonâ fide* or otherwise, as to the contract of December, 1915, could not justify a breach of the later agreement.

The defendant contended that the cars delivered in December ought to be treated as a delivery upon the 1916 contract; the

plaintiff contended that they must be treated as a delivery on the earlier contract; but neither side denied the plaintiff's right to the balance of the 1,200 tons called for in the September contract, at the stipulated price.

The defendant then took an altogether unjustifiable position and refused to carry out the September, 1916, contract unless the plaintiff would abandon its position with reference to the December, 1915, contract. On the 30th December, 1916, the defendant writes, after referring to the dispute and its claim that there was only one contract in force, and the plaintiff's letter of the 28th December, asserting that the contract of December, 1915, was in force: "Inasmuch as you have raised this question, it must be settled one way or the other before we make any more shipments to apply against the contract for the first half of 1917." The letter continues by stating that the question as to the liability under the earlier contract is in the hands of its solicitor.

On the same day, its solicitor writes stating that his client denies any liability under that contract.

There was some conversation about the 1916 contract; and on the 15th January, 1917, the plaintiff writes referring to this, and adding: "In the meantime we refer you to our contract of September 25th, 1916, covering our order No. 6398. In respect to shipment of this contract you will kindly arrange shipment at the rate of 200 to 300 tons per month until the contract is completed."

On the 18th, the defendant replied that the matter had been referred to its counsel, and nothing more was done until, on the 13th February, the plaintiff wrote: "We are completely out of Hamilton pig-iron. What position are you in to make shipments under our contract? We sincerely trust you will be able to arrange shipment immediately."

On the 20th February, the defendant replied, referring to the letter of the 30th December, to which no answer had been received, in accordance with which, "together with the fact that the position taken by us at that date has not in any wise changed, we must insist before making any further shipments on this contract that the question raised by you be definitely settled one way or the other as outlined in our communication of December 30th."

This makes it abundantly plain that the defendant broke its contract and refused to deliver unless the plaintiff would formally abandon its contention with reference to the earlier con-

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tract. Even if the defendant were right in its contention as to this contract being at an end, it had not the right to exact an admission as to this as the price of its performance of its obligation under the later contract.

The contract being broken in this way, of course the pretended forfeiture pending the action makes the situation no better.

At this time the price of pig-iron had advanced to \$39 per ton, and the demand was greater than the supply. This affords the key to the situation.

There remains the question of the measure of damages. It is the difference between the contract price and the market price at the date of the breach: *Jamal v. Moolla Dawood Sons & Co.*, [1916] 1 A.C. 175.

It is contended that, because the plaintiff could buy other iron which might answer its purposes well enough, the price of such iron would give the measure. I can see no justification for this. Why should the defendant retain its product which it had contracted to sell to the plaintiff and realise \$39 per ton and limit the recovery against it to \$34 on any such theory? Here there is no question as to the market price of the very thing sold, and I am not concerned with the price of some other thing suggested as an equivalent.

I am not prepared on the evidence to find that the iron selling upon the market at \$34 was equivalent in all respects to Hamilton pig-iron at \$39.

The result is, that there must be judgment for the difference between the price upon the first contract sued on, \$22.88, and \$39—\$16.12.

For 1,000 tons.....16,120.00

And between the price on the second contract sued on, for the difference between its price, \$23.88, and \$39—\$15.12.

For 1,200 tons less 160 tons 1,740 lbs., say 1,039 tons..... 15,712.65

Or in all.....\$31,832.65

And from this should be deducted the price of the 160 tons 1,740 lbs. delivered..... 3,837.59

Leaving a net sum payable to the plaintiff of.....\$27,995.06

And on this footing the money in Court should be repaid to the plaintiff.

At the trial I gave the plaintiff leave to amend so as to claim an adequate sum. This amendment should be made. The plaintiff should have costs throughout.

The defendant company appealed from the judgment of MIDDLETON, J.

March 13, 14, and 15, 1918. The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

*George Lynch-Staunton, K.C., and J. G. Farmer, K.C.,* for the appellant company. The learned trial Judge erred in holding that the construction of the contract of the 23rd December, 1915, was affected by the course of dealing respecting other contracts between the parties, as evidence of the course of dealing under one contract is not admissible to affect the construction of another contract. The respondent company did not set up in its pleadings any contentions on which the judgment is founded. There was no acquiescence or waiver, as found by the trial Judge. The Judge also erred in holding that the appellant company refused to carry out the September, 1916, contract, unless the respondent company would abandon its position with reference to the December, 1915, contract, because the evidence shews that the appellant company offered to fulfill the 1916 contract if the respondent company would either pay the current price for the 160 tons of iron then in dispute or apply it on the 1916 contract. As to the contract of the 23rd December, 1915, the respondent company has lost its right to have it delivered because of its failure to send specifications as to it in due time. Nor is this contract evidenced as required by the Statute of Frauds, which, though not pleaded, should be allowed now to be relied upon. As to the contract of the 25th September, 1916, the action was brought prematurely. When it was brought, the time had not arrived for commencing deliveries. No doubt, there are cases where the buyer may rescind before the time for delivery, when the conduct of the seller amounts to repudiation; but it can only be done on notice, which was lacking in this case: *Panoutsos v. Raymond Hadley Corporation of New York*, [1917] 1 K.B. 767, [1917] 2 K.B. 473; *Tredegar Iron and Coal Co. Limited v. Hawthorn*

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*Brothers and Co.* (1902), 18 Times L.R. 716; *Shaw's Brow Iron Co. Limited v. Birchgrove Steel Co. Limited* (1889), 6 Times L.R. 50; *Ross Bros. Limited v. Shaw & Co.*, [1917] 2 I.R. 367; *In re L. Sutro & Co. and Heilbut Symons & Co.*, [1917] 2 K.B. 348. Again, the appellant company did not repudiate. As to damages, the respondent company could have obtained other iron as good as that which the appellant company should have supplied at a price of \$5 less than that which the trial Judge treated as the market price; and, therefore, the trial Judge erred in allowing the damages which he did.

*R. S. Robertson and G. H. Sedgewick*, for the plaintiff company, respondent. The learned trial Judge was perfectly justified in his findings. The respondent company did supply specifications, and these specifications were to govern as to all the iron unless the respondent company desired to vary them. As to bringing the action prematurely, although the time for commencing deliveries had not arrived, the respondent company was entitled to treat the contract as rescinded owing to the appellant company having, before the action was begun, repudiated the contract: *Tyers v. Rosedale and Ferryhill Iron Co. Limited* (1875), L.R. 10 Ex. 195; *Ogle v. Earl Vane* (1868), L.R. 3 Q.B. 272; *In re Rubel Bronze and Metal Co. Limited and Vos*, [1918] 1 K.B. 315; *Metropolitan Water Board v. Dick Kerr and Co. Limited*, [1918] A.C. 119. As to damages the learned trial Judge came to the proper conclusion.

*Lynch-Staunton*, in reply.

July 15. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of Middleton, J., dated the 26th October, 1917, which was directed to be entered after the trial of the action before him sitting without a jury at Toronto on the 12th day of that month.

The action is brought to recover damages for alleged breaches of two contracts for the sale and delivery by the appellant to the respondent of pig-iron, one dated the 23rd December, 1915, for 1,000 tons, and the other dated the 25th September, 1916, for 1,200 tons.

The contracts are both on printed forms, and it is a term of them that "all specifications are to be sent by buyer at least 15 days before time fixed for shipment."



There is in the form a space for the statement of the specifications, which refers to the chemical analysis of the iron.

By the earlier contract the time for delivery is stated to be "between date of completion of current contract and June 30th, 1916, in equal monthly instalments;" the blank opposite to the word "specifications" is filled in with the words "to follow," and opposite to the word "remarks" are the words and figures "Order No. 5555."

By the later contract the time for delivery is stated to be "in about equal monthly instalments between January 1 and June 30, 1917;" the blank opposite to the word "specifications" is filled in with the words "to follow," and opposite to the word "remarks" are the words and figures "Order 6398."

At the time when these two contracts were made, there were two existing contracts between the parties, one dated the 14th January, 1914, for 2,000 tons, to be delivered "as required from time to time and as nearly as possible in equal monthly instalments between above date and June 30, 1914," and the other dated the 14th October, 1915, for 1,000 tons, to be delivered "in about equal monthly instalments between date of current contract and June 30, 1916."

Deliveries under the contract of the 14th January, 1914, were not completed until the 12th January, 1916, and the deliveries under the contract of the 14th October, 1915, according to its terms, were to begin at the date of completion of "current contract"—the contract of the 14th January, 1914; deliveries under this October contract began on the 12th January, 1916, and were completed the 1st December, 1916; so that, when the contract of the 23rd December, 1915, was entered into, there was no existing contract under which the respondent was then entitled to have deliveries made, but the contract of the 14th January, 1914.

None of the iron, the subject of the contract of the 23rd December, 1915, has been delivered, and the ground taken by the appellant with respect to it is that the respondent has lost its right to have it delivered because of its failure to send specifications as to it in due time.

The appellant also contends that this contract is not evidenced as required by the Statute of Frauds. The statute is not pleaded; but an application for leave to plead it was made, and should, I

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think, be granted. The statement of claim alleges that the contract was for the sale and delivery of the iron "at Toronto as ordered from time to time by the plaintiffs;" that is not a correct statement, and the pleading must be amended so as to conform with the terms of the contract as stated in it. As a new case is thus made by the respondent, the appellant is entitled to set up in answer to it the Statute of Frauds.

It was not, I think, seriously contended that the contract itself is not a sufficient note or memorandum to satisfy the provisions of the statute, but the statute is relied on to meet the case of a parol variation of the contract as to the time for delivery.

It is, I think, clear that what was meant by the term "current contract" may be shewn by parol evidence, and I agree with the trial Judge that it was established that the reference is to the contract of the 14th January, 1914; that, as I have said, was the only contract under which deliveries were then being made or under which the respondent was then entitled to have deliveries made; and, having regard to this, the parties must, I think, have meant to refer to that contract.

The learned trial Judge has found that the respondent had supplied specifications for all the iron it had bought from the appellant, and that it was well understood by both parties that the specifications which had been supplied were to govern as to all the iron, unless the respondent should desire to vary them and send other specifications. That finding is warranted by the evidence, and is sufficient to dispose of the contention of the appellant adversely to it.

In addition to the reasons assigned by the learned trial Judge for his finding, I may point out that the reference in the contract of the 23rd December, 1915, to order 5555, is to the number which the respondent gave to the order for the iron, which is exhibit 3, and in it it is stated that the analysis, i.e., the specification, is to be the same as former contract; and that the order referred to in the other contract as order 6398 is exhibit 5, and in it it is stated that the analyses are "same as last;" and it is clear therefore that the finding is right, and that in both cases the provisions of the contracts as to sending specifications were strictly complied with.

The position taken by the appellant as to the contract of the 25th September, 1916, is that the action was brought prematurely;

that, when it was begun, the time for commencing deliveries had not arrived. It is answered by the respondent that, although the time for commencing deliveries had not arrived, it was entitled to treat the contract as rescinded, owing to the appellant having, before the action was begun, repudiated the contract.

The dispute as to this contract arose out of the controversy between the parties as to the contract of the 23rd December, 1915, the respondent insisting on deliveries being made under it, and the appellant taking the position that it had ceased to exist, for the reason I have already mentioned. The appellant took the position that it would make no deliveries under the contract of the 25th September, 1916, until that question was settled, and the result of the correspondence between the parties was that on the 20th February, 1917, the appellant wrote to the respondent saying that it "must insist before making any further shipments on this contract" (i.e., the contract of the 25th September, 1916) "that the question raised by you" (i.e., as to the earlier contract being still on foot) "be definitely settled one way or other as outlined in our communication of December 30th."

In the communication of the 30th December, the appellant had said: "Inasmuch as you have raised this question, it must be settled one way or other before we make any more shipments against the contract for the first half of 1917."

The learned trial Judge treated the position taken by the appellant as being that, unless the respondent would formally abandon its contention with regard to the earlier contract, no deliveries would be made under the later one.

I am unable to say that, in so treating it, the learned trial Judge erred; and, so treating it, the respondent was entitled to rescind and to sue for damages in respect of the breach of the contract.

But, if that is not the right view of the position taken by the appellant—and what it really was, was that it would make no deliveries under the later contract until the dispute as to the earlier one was settled—I am of opinion that that was such a repudiation of the appellant's obligation under the later contract as warranted the respondent in rescinding.

The question of what is a repudiation was discussed by McCordie, J., in the recent case of *In re Rubel Bronze and Metal Co. Limited and Vos*, [1918] 1 K.B. 315. He there says (p. 322):—

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"In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they were committed or uttered, and on the general circumstances of the case."

What, then, was the effect of the position taken by the appellant? It was bound by its contract of the 25th September, 1916, to deliver the iron it had contracted to sell to the respondent; there was no question as to its liability under the contract, and it definitely and deliberately refused to perform its undeniable obligation until the dispute as to its liability under the earlier contract was settled. Settled how? If not, as the trial Judge thought, by the formal abandonment by the respondent of its claims under it, then by litigation which might drag along for many months. Surely the taking of such a position is in substance and in effect such a repudiation of the contract as entitled the respondent to rescind.

The reasoning which led the House of Lords to its conclusion in *Metropolitan Water Board v. Dick Kerr and Co. Limited*, [1913] A.C. 119, is applicable. In that case a contract had been entered into for the construction of a reservoir for the Water Board, to be completed within 6 years. The contract provided, in very general terms, that if, by difficulties, impediments, or obstructions, the contractors, in the opinion of the engineer, should be unduly delayed or impeded in the prosecution of the work, the engineer might extend the time for the completion of the works. The Minister of Munitions, while the works were in progress, in exercise of the powers conferred by the Defence of the Realm Act and Regulations, required the contractors to cease work on their contract, and they ceased work accordingly. The contractors contended that the effect of this was to put an end to the contract, and the Water Board that it was only a case for an extension under the terms of the contract of the time for the completion of the works. The contention of the contractors prevailed, and it was pointed out (p. 127) that the result of giving effect to the Water Board's contention would be "not to maintain the original contract, but to substitute a different contract for it."

Reference may also be made to the observations of the Law Lords as to the unfairness of holding the contractors to the per-

formance of their contract for an indefinite period, and the reasons why it would be unfair.

The application I would make of that case and the reasoning in it, is that what the appellant proposes is to substitute for its obligation under the contract an entirely different obligation, and one which would enable the appellant to delay for an indefinite period the delivery of the iron, all of which it had contracted to deliver before the 30th June, 1917.

I have no hesitation in coming to the conclusion that the position taken by the appellant was, in the circumstances, such a repudiation of its obligation as to warrant the respondent in rescinding.

There remains to be considered the question of damages. It is contended that the respondent could have obtained and did in some cases obtain other iron similar to or as good as that which the appellant should have supplied at a price of \$5 less than that which the trial Judge treated as the market price. The view of the learned trial Judge was that he could not find on the evidence that the iron which the respondent could have bought upon the market at \$34 was equivalent in all respects to Hamilton pig-iron at \$39, which was the market price of that iron.

I see no reason to differ from the learned Judge as to this; and I am inclined to think that, as what the appellant had agreed to sell was Hamilton pig-iron, and the market price of it was \$39, the respondent was entitled to recover the difference between that price and the selling price, even if other iron which would answer the same purpose could be bought at \$34.

Upon the whole, I am of opinion that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

July 15.

## MAGILL v. TOWNSHIP OF MOORE.

*Negligence—Obstruction or Nuisance in Highway—Telephones Wires Strung too Low—Proximate Cause of Accident Occasioning Death of Person Passing under Wires—Liability of Township Corporation—Contributory Negligence—Evidence—Inferences from Undisputed Testimony—Appeal—Reversal of Findings of Trial Judge.*

The judgment of CLUTE, J., 41 O.L.R. 375, in favour of the plaintiffs, in an action for damages for the death of their son, was reversed (MEREDITH, C.J.O., dissenting).

*Held*, by MAGEE and FERGUSON, JJ.A., that the findings of fact of the trial Judge, that the death of the plaintiffs' son was caused by his losing control of the horses which he was driving from the top of a load of hay, and that the loss of control was attributable to the position of the defendants' telephone wires, which were placed so low that the deceased could not pass under them without kneeling or crouching, were based upon inferences from undisputed testimony; the proper inferences had not been drawn; and it was the right and duty of the appellate Court to reverse those findings. Upon the proper inferences to be drawn from the evidence, the plaintiffs had failed to make out that the accident occurred solely by reason of the negligence of the defendants, and without negligence on the part of the deceased.

*Per* HODGINS, J.A.:—There was such a lack of certainty in arriving at the right conclusion as to the proximate cause, that the Court was justified in saying that the plaintiffs had failed to prove negligence in the defendants.

*Per* MEREDITH, C.J.O.:—The finding of the trial Judge that the obstruction caused by the wires was the proximate cause of the accident, was based upon a reasonable inference from the evidence, and should not be reversed.

AN appeal by the defendants from the judgment of CLUTE, J., 41 O.L.R. 375.

March 12 and 13. The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

*R. I. Towers and A. Weir*, for the appellants. There was no evidence on which the learned trial Judge could properly find that the placing of the wires at their existing height was the proximate cause of the accident which resulted in the death of the plaintiffs' son. The learned trial Judge drew the inference that the deceased lost control of his horses because he had to kneel or crouch in order to pass under the wires. But other inferences might be rightfully drawn, and something else shewn to be the proximate cause; and, as this is left in doubt, the appellants should not be found guilty of negligence causing the accident: *Kolari v. Mond Nickel Co.* (1914), 32 O.L.R. 470, 20 D.L.R. 412. The evidence at the trial disclosed that the deceased used a flat hay-rack, which was, to his knowledge,



in constant danger of upsetting; that he tried to cross a rough and uneven piece of road without any bridge or other secure means of crossing; that he attempted the journey in an uncertain light, and with full knowledge of the danger of upsetting; and that these acts of negligence were the proximate and effective causes of the accident—that the deceased could, by the exercise of reasonable and ordinary care, have avoided the accident. As the action was not tried by a jury, and the appeal was from a judgment based on inferences of fact drawn by a trial Judge, this Court should reverse the findings of fact. The findings in regard to the construction and maintenance of the appellants' line were not justified by the evidence. The evidence shewed that the appellants erected and maintained the wires in question along the highway under the authority of a by-law of the municipal corporation passed in pursuance of the Ontario Telephone Act, and without negligence. The plaintiff Louisa Magill suffered no damage, and the plaintiff William Magill released any claim which he might have. As between the defendant township corporation and the defendant telephone association, the former is a trustee for the subscribers of the latter, and as such trustee is entitled to indemnity.

*J. R. Logan*, for the plaintiffs, respondents. The findings of the learned trial Judge are amply justified by the evidence, and should not be disturbed. He has found that the obstruction caused by the wires was the proximate cause of the accident. The evidence plainly shews that the driver lost control of the horses owing to the wires, partly because he had to crouch down in order to pass under them, and partly because they diverted his attention: *Glynn v. City of Niagara Falls* (1914), 31 O.L.R. 1, 16 D.L.R. 866. The evidence establishes that the accident was due to the negligence of the appellants in placing the wires where they did, and that there was no contributory negligence on the part of the deceased.

*Towers*, in reply.

July 15. FERGUSON, J.A.:—Appeal by the defendants from a judgment of Clute, J., dated the 22nd December, 1917, pronounced after a trial at Sarnia without a jury on the 5th December.

The plaintiffs are the father and mother of James Magill, aged, at the time of the accident, 22 years, who on the 30th July, 1917, while engaged in drawing hay from a field on his father's farm,

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was killed in the upsetting of a load of hay on which he was driving. It is alleged and found that the accident occurred by reason of the deceased losing control of his horses, and that this loss of control was occasioned by his being obliged to crouch down on the load of hay while passing under the wires of the rural telephone system, owned or controlled by the defendants, and that such wires were negligently and wrongfully erected upon the highway, in being at the place where the accident occurred only 13 feet 6 inches above the level of the way, and thus not leaving sufficient space to allow the deceased to drive under them standing up on his load of hay.

The defendants contend that the accident occurred by reason of the nature of the truck and rack used for the purpose of drawing hay, and attempting with that equipment to drive the load of hay in an angling direction from the field to the travelled part of the highway, by crossing a hollow created by removing earth to grade the travelled way, and a furrow ploughed on the untravelled part of the way; and that the deceased, from his prior experience in the preceding year and on the same day, knew that the loads were apt to upset, and voluntarily accepted that risk, and also knew that it was necessary to crouch down on the load to drive under the wires; and that, even if the wires were wrongfully or negligently erected, and even if the accident occurred by reason of the deceased losing control of his horses in crouching down to pass under the wires, yet that the deceased, knowing the necessity of doing so, and the effect and danger thereof, should have made an effort to avoid such danger by sitting down on his load or by leading his horses under the wires, or by building a smaller load, or should have taken some other method of avoiding the danger of upsetting and the additional danger created by the alleged negligence of the defendants; and that, failing to make such an effort, the deceased was knowingly negligent, and that his was the ultimate negligence, or at least that his negligence was a cause so contributing to the accident as to prevent the plaintiffs succeeding in this action.

As to the defendants' negligence, the learned trial Judge says (41 O.L.R. at p. 388):—

"It is not contended that the line was not authorised or the poles not properly placed, but that ordinary care had not been used in protecting a place which, for many years and at the time the line was laid, was a place of exit from the fields upon the highway."

And finds (pp. 385, 386):—

“No date, as far as I have noted, was given when the cross-bar was put on in 1911. It would appear that, at the time the line was put up in 1908, no obstruction was caused in passing in and out of this gateway; that, if the lower cross-bar was put on after the 30th June, 1911” (sec. 26 of the Telephone Act provides that the standard specifications shall not apply to the plant or equipment constructed or operated prior to the 30th June, 1911), “and the wires placed thereon, it would be an erection upon a pole 20 feet in height instead of 25 feet, contrary to the standard specifications above referred to, which provide that all lines to carry more than one cross-arm shall consist of two poles not less than 25 feet in length. If this erection took place prior to the 30th June, 1911, then I find as a fact that it was an obstruction and shewed negligence and want of reasonable and proper care in its construction.” And at p. 391: “I think that the position of the wires causing the deceased to stoop or crouch down in passing under them was the proximate cause of the horses getting from under that control which was necessary to secure the safe passage of the load.”

The defendants urged that neither finding in reference to the construction and maintenance of their line was justified by the evidence; but, as I view the case, it is not necessary for me to discuss those findings. In my view, the burden of the issue was upon the plaintiffs to establish that the accident occurred solely by the negligence of the defendants and without negligence on the part of the deceased; and, if the evidence offered is as consistent with the accident having arisen from other causes or from the negligence of the deceased as from the negligence of the defendants, the case of the plaintiffs is not made out: *Burns v. City of Toronto* (1878), 42 U.C.R. 560, 575; *Beven on Negligence*, Can. ed., p. 115.

The plaintiffs must, I think, establish: (a) that the deceased lost control of his horses; (b) that such loss of control caused the upset; (c) that the negligent placing of the defendants' wires caused the loss of control; and, assuming that the wires were an obstruction which the defendants should not have permitted to exist, and that therefore they were in an unlawful position on the highway, yet the evidence must not disclose that the deceased, knowing they were there and the danger of doing so, did

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negligently or wittingly, and in that sense wilfully, drive under them, thereby causing the accident to happen.

The learned trial Judge has answered these questions in favour of the respondents, and the first question that suggests itself to my mind is whether or not it is open to an appellate Court to reverse his findings of fact. Had the questions been answered by a jury, I should not be able to say there was not evidence to support the finding, within the meaning of *Toronto R.W. Co. v. King*, [1908] A.C. 260, 270; or, if we were obliged to differ from the trial Judge as to the credibility of the witnesses, I would not, in view of *Wood v. Haines* (1917), 38 O.L.R. 583, 33 D.L.R. 166, and *Lodge Holes Colliery Co. Limited v. Wednesbury Corporation*, [1908] A.C. 323, 326, undertake the responsibility of differing from him; but this is not a jury action, and it is not necessary to deal with the credibility of the oral testimony; there is no dispute on the evidence; it is only a question of what is the proper inference and conclusion to be drawn from the undisputed testimony; and in that case I think it is not only within our power to differ from the trial Judge, but it is our duty to do so, if our views do not in fact agree with those of the trial Judge: *Montgomerie & Co. Limited v. Wallace-James*, [1904] A.C. 73, 75; Halsbury's Laws of England, vol. 23, p. 202, para. 371.

In *Jones v. Hough* (1879), 5 Ex. D. 115, 122, Bramwell, L.J., says:—

“Where the jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the Judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that is our jurisdiction, our power, and our duty: and if, upon these materials, judgment ought to be given in any particular way different from that in which Lindley, J., has given it, we ought to give that judgment.”

See also *Read v. Anderson* (1884), 13 Q.B.D. 779; *Dempster v. Lewis* (1903), 33 S.C.R. 292; *Hood v. Eden* (1905), 36 S.C.R. 476, 484; *Ogilvie Flour Mills Co. Limited v. Morrow Cereal Co.* (1917), 41 O.L.R. 58, 39 D.L.R. 463; *Barron v. Kelly*, [1918] 2 W.W.R. 131, 146.

The opinion of the trial Judge is not, however, to be lightly

brushed aside as being without weight. Such cases as *Colonial Securities Trust Co. v. Massey*, [1896] 1 Q.B. 38, and *George Matthews Co. v. Bouchard* (1898), 28 S.C.R. 580, establish a presumption that the opinion of the trial Judge is right, and require us to give due weight to his findings, and not to reverse him unless of the opinion that he is clearly wrong. In the case at bar, while I am unable to say that the accident might not have happened from the cause stated by the learned trial Judge, I am clearly of the opinion that the evidence does not establish either that it did so happen, or facts from which it may without reasonable doubt be properly inferred that it did so happen. In this view I am to some extent confirmed by the following statement of the trial Judge (41 O.L.R. at p. 378):—

“It was agreed by witnesses on both sides that taking the curve over these inequalities would cause the load to oscillate first to the left, then to the right, then again to the left and again to the right, and finally, in crossing the crown of the road, again to the left and to the right. The load was thrown off on the right hand side, the rack going with the load and landing upside down, resting upon the top of the ladders both front and rear.”

The learned trial Judge does not explain why or how he disregards these facts as factors in the accident, and finds a loss of control of the horses as being the sole and proximate cause of the upset.

It is established that the accident occurred at about 8 o'clock at night; that the deceased had, the year prior, drawn hay from the same field through the same gateway and under some wires placed at the same height; that he had, on the day of the accident, drawn several loads of hay under these wires out of the same gate, over the same way, ditch, furrow, and rough place; that the hay was loaded upon a truck, front wheels 23 inches, hind wheels 32 inches, rigged with a flat rack, 8 feet 6 inches wide and 16 feet long, with a ladder on each end, 5 feet 2 inches high, measured from the platform of the rack (p. 33 of the notes of evidence); that the rack was fastened to the waggon by No. 12 wire twisted, instead of by bolts; that the platform of the rack was 3 feet 7 inches above the ground, and the hay stood about 6 feet 2 inches above the rack, making the top of the load about 9 feet 9 inches high, and leaving driving room or headway under the wires of 4 feet 3 inches

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(p. 35), to which should be added as headway the amount a person standing on a load of loose hay would sink down into it. It was also established that the ground over which the hay had to be driven in passing from the field to the highway and the travelled part thereof was rough and uneven, with a considerable slope down to and up from the ditch (Fawcett's evidence, pp. 48-51; John Magill, p. 67).

After a very careful perusal and consideration of the opinion of the learned trial Judge, the evidence, and the exhibits, I am not able to say that it is established in evidence that the deceased did lose control of his horses, or that, if he did, the accident was the result of such loss of control, and was not caused by the unbalancing of the load on a loose, flat rack, in being driven, even carefully, over the rough ground at the place of the accident, nor am I able to say that the deceased was not guilty of contributory negligence. Thus differing as I do from the trial Judge on a question of fact or on the proper inferences or conclusions to be drawn from the facts established, I think it is seemly that I should quote largely from the evidence; but, so as not to make this opinion too long, I have, while quoting the evidence, attached it as an appendix hereto.\*

A perusal of the evidence quoted in the appendix will shew that the learned trial Judge allowed the witnesses to express their opinion as to how or why the accident occurred. As I read the evidence, the statement of the witness Hird, as to the whiffle-trees striking the horses and the loss of control, was a statement of his opinion rather than a statement of fact. Some of the witnesses may have qualified so as to entitle them to express opinions—certainly the boy Hird did not qualify as an expert. However, it appears to me that it was for the trial Judge, and it is now for the members of this Court, to draw their own inferences and conclusions from the facts established, rather than to accept the opinion of any of these witnesses; and, the facts not being in dispute, it seems to me that this Court is in as good a position to draw inferences and to form an opinion on the evidence as was the trial Judge. See *Beven on Negligence*, Can. ed., pp. 130, 131.

It must not be lost sight of that it was not the waggon that upset, but the load and rack that left the gear. I cannot help but

\*The appendix referred to is not made part of this report.



think that the flat rack, 8 feet 6 inches wide and 16 feet long, with a load on it such as is described in evidence, fastened to the truck by wire, was a dangerous kind of load to drive over any appreciably rough ground. See *Bradley v. Brown* (1872), 32 U.C.R. 463, where it was held to be negligence to drive a load of empty barrels along a road containing, to the knowledge of the plaintiff, deep ruts, without having the rack fastened.

In this case, the deceased knew the nature of the ground. He knew of and had his attention focussed on the wires; he knew he had with each load to jump from side to side of his load either to escape in case the load went over or to balance the load. He knew that his brother had, the prior year, deemed it necessary or advisable at this spot to balance the load by walking alongside to support it with a pitch-fork; he knew and appreciated the fact that he had to crouch down under the wires—that each time the load struck the grade the horses trotted a little. I would not infer that that trotting a little on a pitch into the furrow and ditch was necessarily caused by slack lines, or a loss of control, or that such trotting was the sole cause of the accident; but, if the contrary be the proper inference, yet, to my mind, the question of contributory negligence is a serious obstacle in the way of the plaintiffs. Can it be said that, with his knowledge of the dangers, the deceased was entitled to take the risk, and, if he failed to arrive in safety, to lay the blame on the defendants' wires, or must he not bear the burden of his own folly or neglect?

Whether or not the deceased was guilty of contributory negligence is a question of fact rather than law, and of the standard of conduct, the care which a competent, prudent driver similarly placed, having the same knowledge of danger which the deceased had, would ordinarily exercise.

As said by Armour, C.J., in *Gordon v. City of Belleville* (1887), 15 O.R. 26, 30:—

“The care he will be required to exercise must be commensurate with his knowledge . . . such care as a prudent man would reasonably exercise . . .”

The learned trial Judge does not, in his opinion, discuss the evidence on the question of contributory negligence. He seems to assume that, because the jury in *Ferguson v. Township of Southwold* (1895), 27 O.R. 66, found as a fact that the defendants were guilty

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of negligence and that the plaintiff was not guilty of contributory negligence, the deceased was in an equally good position; but Lord Halsbury in *London Joint Stock Bank v. Simmons*, [1892] A.C. 201, 208, said that no one case can be authority for another when the solution rests on evidence.

The appellate Court was asked in the *Ferguson* case to reverse the finding of a jury, and consequently to say that there was no evidence to support that finding. Here, however, we are asked and permitted to review the finding and conclusion of the trial Judge, made on undisputed facts. The two propositions seem to me to be entirely different. In the *Ferguson* case it was not shewn that the plaintiff had previous trouble or narrow escapes in passing under the limb of the tree overhanging or obstructing the travelled part of the highway. Had the accident in the case at bar occurred the first time the deceased drove under the wires, or had it not been shewn that every previous load appeared likely to upset, I should find greater difficulty in saying that the deceased knew and appreciated the danger than I now do. If he knew the danger and voluntarily accepted the risk or exercised no greater care because of the danger, he cannot, I think, succeed: *Williams v. City of Portland* (1891), 19 S.C.R. 159; I can find nothing in the evidence which would suggest that anything different happened when the accident occurred than had happened on each previous occasion, except what ought reasonably to have been expected by a prudent man, that is, that the deceased was not able on his last venture to establish the balance of his load by jumping from side to side thereof. Should it then be said that, with this knowledge, the deceased acted as a person of ordinary care and prudence, in attempting to pass over that rough piece of ground with that truck equipped and loaded as shewn in the evidence? If not, and I cannot bring myself to think that it should, then he had no right to make the experiment except at his own risk. See also *Hutton v. Corporation of Windsor* (1874), 34 U.C.R. 487; *Castor v. Corporation of Uxbridge* (1876), 39 U.C.R. 113; *Carson v. Village of Weston* (1901), 1 O.L.R. 15.

The only principle on which I can see that the action of the deceased might be justified is, that the defendants were not entitled negligently to create a situation of danger, and then, by pointing out the danger, to relieve themselves from liability, by

taking the position that the deceased, while the danger continued, should not have used this dangerous way at all. This principle is stated and discussed in Pollock on Torts, 10th ed., p. 500; and, as there pointed out, on the authority of *Clayards v. Dethick* (1848), 12 Q.B. 439, the defendants cannot, by creating a dangerous obstruction, take away the right of the deceased to come out of such a gate or passageway; but it is also pointed out that, while the deceased is entitled to use such a dangerous gate or passageway, he cannot disregard the obstruction, but must use extra care reasonably commensurate with the danger, and the question to be decided under such circumstances is, whether or not, in using the gateway with knowledge of the danger, he used common prudence in making the attempt in the manner in which he did make it. Applying that statement of the law, and keeping in mind that the deceased was not bound to refrain altogether from the use of the gateway in question, merely because the defendants had made it more dangerous than it otherwise would have been, I still think that, had he used care or prudence commensurate with the danger, the accident could not have occurred, from the cause found, loss of control. He could have had his waggon more securely equipped and his rack more securely fastened. He could have sat down and driven; he could have built his load lower; or have so built his load as to have left himself a place to stand while driving under the wires; he could have walked and driven his team; or he could have led his team. I think he could even have abated the nuisance. In my opinion, he was not forced to take the risk he did take, or refrain from using the gateway, which was the situation in *Clayards v. Dethick*; see also *Butterfield v. Forrester* (1809), 11 East 60; *Mayor of Colchester v. Brooke* (1845), 7 Q.B. 339, 377; 29 Cyc. 515, 518, 521; *Lax v. Corporation of Darlington* (1879), 5 Ex. D. 28, 35.

True, as stated by the learned trial Judge, the deceased was not obliged to do the wisest thing; but yet he was obliged to act as a prudent man would have acted in the circumstances—no more and no less—and, in my view, he did not act according to that standard: *Thompson v. North Eastern R.W. Co.* (1860), 2 B. & S. 105, 117.

For these reasons, I am of opinion that the plaintiffs have failed to make out that the accident occurred solely by the negligence of the defendants, and without negligence on the part of the deceased.

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I would allow the appeal with costs, and dismiss the action with costs.

Taking the view I do, it is not necessary for me to deal with the other questions raised by the appellants, which include a claim that their wires were not, under the Telephone Act, either wrongfully or negligently placed; that the plaintiff Louisa Magill suffered no damage, and that the plaintiff William Magill released any claim he might have by a document in writing (exhibit 7), referred to at pp. 37 and 107 of the evidence; and that the Telephone Association was not an entity that could be sued.

MAGEE, J.A., agreed with FERGUSON, J.A.

HODGINS, J.A.:—The facts elicited in this case are simple enough. The deceased was driving a loaded hay-waggon out of the field on to the road. The track left the field at an angle, and the load had to go down into the ditch on this angle, and so up to the crown of the road. The three telephone wires were just where the track left the field; and, owing to the height of the load, the deceased had to go down on one knee while passing under them. He then got up on his feet, and, as the horses broke into a trot, the load oscillated, and he jumped to one side and then to the other to steady it. The load went over to the right, carrying him with it, and he was killed.

The learned trial Judge drew the inference that the deceased lost control of the horses when compelled to kneel while passing under the wires, and then he relates the accident to the wires, because their position caused the deceased to kneel. No one deposed to this nor to the loss of control as facts, but opinions were expressed that these were the real and proximate cause.

Obviously other inferences were open. The loss of control may have been due to the slackening of the reins as the horses breasted the rise from the ditch to the crown of the road, or the deceased may not really have lost control, and the overturn may have been caused by the oscillation due to faulty loading, the uneven course followed, or to his own weight being thrown upon the down side, or because his weight on the upside caused a more violent return to the other.

In these circumstances, was the negligence which the learned

Judge found to exist in the placing of the wires the proximate cause of the death, or is the exact cause left in doubt, and is it probably or possibly due to some other condition not connected at all with the wires?

While usually the operative negligence must be proved before a plaintiff can succeed, there seem to be two instances in which it may be inferred from the facts without there being exact demonstration. These are: (1) in cases to which the phrase *res ipsa loquitur* is applied, where matters proved point inevitably to one conclusion; or (2) where, though not clearly indicated, there is only one inference that can reasonably be drawn, as in the cases of *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, followed in *St. Denis v. Eastern Ontario Live Stock and Poultry Assn.* (1916), 36 O.L.R. 640, 30 D.L.R. 647, and *Ryan v. Canadian Pacific R.W. Co.* (1916), 37 O.L.R. 543, 32 D.L.R. 372.

Here other conclusions are open, some of them entirely disconnected with the cause for which the appellants have been found liable. This is not a case where, as in *Kolari v. Mond Nickel Co.*, 32 O.L.R. 470, 20 D.L.R. 412, all three possible causes involved negligence in the defendants.

The learned trial Judge was, of course, entitled to make the inference he did, or any other sustained by the proved facts, and I presume this Court is equally justified in doing the same thing. In the case of *Toronto Power Co. v. Raynor* (1915), 51 S.C.R. 490, 25 D.L.R. 340, the Supreme Court of Canada reversed a very similar finding, which was really an inference from the facts, although confirmed by the Court of Appeal for Ontario. And, if any of these deductions are reasonable and are inconsistent with negligence in the appellants, how can it be said that they are liable? For what happened may after all not have been caused by their fault.

The matter is left in doubt, and, if so, the respondents cannot succeed.

I think, with deference, that there is such a lack of certainty in arriving at the right conclusion as to the proximate cause, that the Court is justified in saying that the respondents have failed to prove negligence in the appellants, and that the appeal should succeed and the action be dismissed.

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MEREDITH, C.J.O.:—I am unable to agree with the conclusion to which my learned brothers have come.

The right of the respondents to recover depends upon whether or not it is a proper conclusion upon the evidence that the obstruction to the reasonable use of the highway caused by the telephone wires was the proximate cause of the injury to the deceased which caused his death.

It was proved that, owing to the presence of the wires, it was necessary to crouch down upon the load of hay that he was driving, and that in doing this he lost to some extent the control of his horses. There was also evidence that, owing to this having happened, the horses trotted upon the uneven surface on the side of the highway, and that this caused the overturning of the load of hay and the injuries to the deceased. It is not an unreasonable inference that, as the witness Alfred Hird, who was on the load of hay, testified, the whiffletrees came into contact with the horses' legs, and that was what caused them to trot.

The case is one to which, in my opinion, the principle that one who is suddenly confronted with a danger caused by the acts or neglect of another is not bound to do that which is best in the circumstances to avoid it, applies: the deceased had, to some extent at least, lost control of his horses; and, even if after passing the wires he might have resumed that control and did not do so, he is not to be charged with having been himself responsible for the accident which happened to him.

The learned trial Judge has found that the obstruction caused by the wires was the proximate cause of the accident. That was a reasonable inference from the evidence, though no doubt the inference that my learned brothers draw might have been drawn.

I have not overlooked the evidence as to the manner in which the rack was placed upon the truck, and the argument that the overturning of the hay was due to the insecure manner in which the rack was placed. That view was rejected by the learned trial Judge, and I am unable to say that in rejecting it he erred.

I am, for these reasons, unable to see my way to reversing the findings of fact of the learned Judge; they should not be reversed unless they are clearly wrong; and, in my view, that has not been shewn.

I would dismiss the appeal with costs.

*Appeal allowed; MEREDITH, C.J.O., dissenting.*



## [APPELLATE DIVISION.]

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July 15.

## REX V. QUINN.

*Criminal Law—Procuring Girls for Unlawful Carnal Connection with Men—Criminal Code, sec. 216 (1) (a) (3 & 4 Geo. V. ch. 13, sec. 9)—Evidence—“Procure”—Bringing Prostitutes and Men together—Proof of Offence—Corroboration—Indictment—Uncertainty—Duplicity.*

The defendant was charged, under sec. 216 (1) (a) of the Criminal Code, as enacted by 3 & 4 Geo. V. ch. 13, sec. 9, for that he did at divers times between two named dates, at the city of O., “unlawfully procure girls to have carnal connection with another person or persons within Canada,” and was tried thereon and convicted by a County Court Judge:—

*Held* (HODGINS, J.A., dissenting), that the conviction should be quashed.

*Per* MEREDITH, C.J.O., and MAGEE and FERGUSON, J.J.A.:—The defendant was a cab-driver and the girls mere prostitutes; what the defendant did was to drive the girls and men who wished to have carnal connection with the girls to a place where they could and did have it. This was not “procuring” the women to have intercourse with the men; nor did the fact that it was the defendant who brought them together for that purpose make it “procuring.” What the defendant did was not an offence within the meaning of the statute.

*Per* CLUTE, J.:—The indictment or charge was bad for uncertainty and for having charged in one count more offences than one.

Section 852 of the Criminal Code considered.

Review of the authorities.

*Per* HODGINS, J.A.:—The defendant did not merely provide the means to enable these women and men to gratify their desires; he induced, caused, or brought about by solicitation the having of improper intercourse, quite apart from the use of his vehicle as a means of transportation. It was what the defendant did and said that “procured.”

(2) The indictment or charge was bad for duplicity; but sec. 1019 of the Criminal Code should be applied to save the conviction from invalidity on that ground.

*Rex v. Thompson*, [1914] 2 K.B. 99, followed.

(3) The evidence of one of the girls as to one of the offences deposed to by her was sufficiently corroborated.

CASE stated by the Junior Judge of the County Court of the County of Carleton in respect of questions arising upon the trial of the defendant, before that Judge without a jury, upon a charge of unlawfully procuring girls to have unlawful carnal connection with another person or persons within Canada, viz.: (1) Was there evidence of procuring? (2) Was the evidence of witnesses for the Crown corroborated? (3) Was the indictment bad for uncertainty or for having charged in one count more offences than one?

March 11. The case was heard by MEREDITH, C.J.O., MAGEE and HODGINS, J.J.A., CLUTE, J., and FERGUSON, J.A.

*Gordon Henderson*, for the defendant, argued, first, that there was no evidence of procuring within the meaning of sec. 216, sub-

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sec. 1, cl. (a), of the Criminal Code, as enacted by (1913) 3 & 4 Geo. V. ch. 13, sec. 9 The defendant simply provided the means of conveyance to a place where men and women who wished to copulate could conveniently gratify their desires. Procuring, as used in the Code, means rather an active inducing of the girls. Secondly, the evidence of the witnesses for the Crown lacked the corroboration required by sec. 1002 of the Code: *Rex v. Baskerville*, [1916] 2 K.B. 658. Lastly, the indictment was bad for duplicity: *Rex v. Edwards* (1912), 8 Cr. App. R. 128. No offence was sufficiently charged to identify it: *Rex v. Hammick, Ex p. Murdoch*, [1918] W.N. 111.

*Edward Bayly*, K.C., for the Crown, contended that the defendant was not merely a passive agent employing means of transportation, but that he had actively brought about the improper intercourse, and so had procured the girls within the meaning of the Code: *The People v. Van Bever* (1911), 248 Ill. 136; *Rex v. De Marny*, [1907] 1 K.B. 388. There was sufficient corroborative evidence of the third offence at least. While the indictment might be bad, it was too late now to object to it. In addition to this, it was subject to the curative effects of sec. 1019 of the Code. The defendant was not prejudiced by the loosely drawn indictment, and so there had been no substantial miscarriage of justice: *Rex v. Thompson*, [1914] 2 K.B. 99.

July 15. MEREDITH, C.J.O.:—Case stated by the Junior Judge of the County Court of the County of Carleton.

The prisoner was convicted upon a charge that he at divers times between the 13th day of June and the 13th day of September in the year of our Lord one thousand nine hundred and seventeen, at the city of Ottawa . . . did unlawfully procure girls to have unlawful carnal connection with another person or persons within Canada.

The questions stated for the opinion of the Court are:—

1. Was there any evidence that the accused procured girls as charged in the indictment?

2. Having regard to the provisions of sec. 1002 of the Criminal Code—

(a) Was the testimony of the witness Germaine Bailey corroborated?

(b) Was the testimony of the witness Emilda Poirier corroborated?

I am of opinion that the first question should be answered in the negative.

I do not think that in what the prisoner did he procured the girls in respect of whom the charge against him was made to have unlawful carnal connection with men, within the meaning of sec. 216, sub-sec. 1, cl. (a), of the Criminal Code, as enacted by the statute of 1913, 3 & 4 Geo. V. ch. 13, sec. 9.

The prisoner was a cab-driver, and the girls mere prostitutes. They were desirous of plying their trade, and there were men that were desirous of having carnal connection with them, and what the prisoner did was to drive the girls and the men in his cab to a place where they could have and had carnal intercourse with the men.

That, in my opinion, is not what the provision of the Code under which the prisoner was charged was aimed at; nor what, according to the fair meaning of the provision, it makes an offence.

One who merely provides the means by which men and women who are desirous of having carnal intercourse can conveniently gratify their desires does not, I think, in any fair meaning of the word, "procure" the women to have that intercourse with the men. It cannot be, I think, that if a man and woman who are desirous of having sexual connection employ a cab-driver to take them to a place where they may have it, and the cab-driver does that, he can be said to procure the women to have unlawful carnal connection with the men; nor does it, I think, make any difference that it is the cab-driver who brings them together for that purpose.

As I have come to this conclusion, it is unnecessary to answer the other questions.

MAGEE and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

CLUTE, J.:—Case reserved by His Honour Judge Gunn, Junior Judge of the County Court of the County of Carleton.

The accused was charged, under sec. 216, sub-sec. 1, cl. (a), of the Criminal Code, "for that he, the said Clement Quinn, at divers times between the 13th day of June and the 13th day of September in the year of our Lord one thousand nine hundred and seventeen,

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at the city of Ottawa, in the said county, did unlawfully procure girls to have carnal connection with another person or persons within Canada, contrary to the form of the statute in such case made and provided."

Questions of law submitted:—

(1) Was there any evidence that the accused procured girls as charged in the indictment?

(2) Having regard to the provisions of sec. 1002 of the Criminal Code—

(a) Was the testimony of the witness Germaine Bailey corroborated?

(b) Was the testimony of the witness Emilda Poirier corroborated?

(3) Was the indictment bad for uncertainty or for having charged in one count more offences than one?

Dealing with the last objection first, I am of opinion that the indictment is bad on both grounds—(1) for uncertainty and (2) for having charged in one count more offences than one.

This is an indictable offence, and sec. 852 of the Code is applicable. No doubt, the manner of pleading is much simplified, but it is still necessary that every count shall contain in substance a statement that the accused has committed some indictable offence therein specified, and such statement may be made in popular language without any technical averments or matter not essential to be proved, and may be in the words of the enactment describing the offence committed or in words sufficient to give the accused notice of the offence with which he is charged. In the present case no particular offence is charged, that is, the name of the girl procured is not given. The indictment would probably be good if it were stated that the person was unknown, if such was the fact. This indictment is under a general section, No. 216, in which there are twelve distinct classes of cases. I think the occasion and the offence should be identified. Mr. Bayly admitted, as I understood him, that the count was bad, but contended that objection to the form of the count was too late. No amendment was asked. I do not think this answer is tenable. In my view, the count as it stands presents no charge upon which the accused can be put upon his trial. It is true that this is not an indictment in the ordinary sense, but it requires a reasonable particularity to enable the accused to know what particular offence is charged.

Form 64 referred to in sec. 852 gives examples of the manner of stating the offence, and it is quite clear that a mere description of a crime is not stating an offence. You cannot say that A. is guilty of murder or B. of theft or false pretences as the case may be: *Rex v. Bainbridge* (1918), 42 O.L.R. 203; *Rex v. Jackson* (1917), 40 O.L.R. 173.

The present case is that of a trial by a Judge of the County Court, under sec. 824 and following sections of the Code. It is the duty of the Judge to state to the prisoner that he is charged with the offence, describing it. If the prisoner, upon being arraigned, consents and pleads "not guilty," the Judge may proceed to try him, and sec. 833 (3) provides that the prosecuting officer in such case shall draw up a record as nearly as may be in form 61. A reference to this form shews that it describes the offence as is usual in an indictment—sufficiently specifically to identify it.

Mr. Bayly referred to *Rex v. Thompson*, [1914] 2 K.B. 99, where it was held that, although the indictment was bad in that it charged more than one offence in each count, yet, as the prisoner had not in fact been embarrassed or prejudiced in his defence by the presentment of the indictment in this form, there had been no substantial miscarriage of justice, and the appeal must, therefore, be dismissed. Upon reference to that case, it will be found that the charge was one of incest, and was specific in naming the person with whom the offence was committed, and the only objection to the charge was that, instead of naming a particular occasion, it charged that "on divers days" between such and such dates the offence was committed: see *Rex v. Edwards*, 8 Cr. App. R. 128.

In the case at bar, in my view, no offence is sufficiently charged so as to identify it. The class to which the offence belongs is stated, but there is no statement as to when or with whom the offence was committed.

Section 1007 provides that the accused may, at any time before sentence, move in arrest of judgment, on the ground that the indictment does not state any indictable offence, and (3), if the Court decides in favour of the accused, he shall be discharged from that indictment. This is not in conflict with sec. 898, which provides (2) that no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

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It is true that the Imperial Act from which this is taken is qualified by the adjective "formal," but there cannot, I think, be any doubt that sec. 1007 has reference to formal defects only, and not to the entire omission of essential allegations necessary to constitute the offence.

In *Regina v. Carr* (1872), 26 L.C. Jur. 61, the indictment was for felonious wounding with intent to murder. Sections 32 and 78 of 32 & 33 Vict. ch. 29, allowed a motion in arrest of judgment for any substantial defect in an indictment. It was held that the omission of the words "of malice aforethought" from the averment of the intent constituted a substantial defect, and the conviction was quashed in a Court of five Judges, *dissentiente* Caron, J., who took the view that under sec. 27 the prisoner had sustained no injury, and the offence intended to be charged could be understood, and by sec. 79 that, where the offence charged is created by statute, an indictment after verdict shall be held sufficient if it describes the offence in the words of the statute creating the offence. The majority of the Court, after referring to sec. 32, which provides that every objection to an indictment for any defect apparent on the face thereof must be taken by demurrer or motion to quash, before the defendant has pleaded, and not afterwards, held, that a motion in arrest of judgment should be allowed for any defect in the indictment which could not have been taken advantage of by demurrer, or amended under the authority of the Act; that the question was now reduced to know what defects were not amendable, and that those were defects which could not be amended, and would be denominated substantial defects, as distinguished from formal defects, or defects which could be cured by amendment; and the Court further held that the omission of the words "of malice aforethought" should be considered substantial, and their omission unaided by a verdict; and judgment was arrested.

In *Regina v. Deery* (1874), 26 L.C. Jur. 129, it was held by the majority of the Court, Monk, J., dissenting, where the words "of malice aforethought" were in the averment of the first count of the indictment but omitted from the second, that this omission was not available in arrest of judgment. It was held that, objection to this omission not having been taken until after verdict, the count was sufficient. Dorion, C.J., refers to sec. 10 of the Act 32 & 33 Vict. ch. 20, which provides that whosoever wounds or



causes any grievous bodily harm to any person, with intent to commit murder, is guilty of felony, and points out that the indictment is for an offence committed under this section, and refers to authorities to shew that the count was sufficient without the words "of malice aforethought," and says: "We are of opinion that, under these authorities, we are justified, notwithstanding the somewhat different ruling given in the case of *Regina v. Carr*, to hold that the objection made to the indictment after verdict cannot be maintained, whatever might have been its effect if it had been taken before. Upon this point we abstain from giving any opinion."

It will be observed that, at the time of these decisions, sec. 79 of the Procedure Act, 32 & 33 Vict. ch. 29, was in force, which provides that an indictment shall after verdict be held sufficient if it describes the offence in the words of the statute; and, as is pointed out by the Chief Justice, this would alone seem to justify the judgment—that, no objection having been taken to the indictment before the verdict, the verdict ought to be sustained. Having regard to the form of the indictment in that case, and the particularity with which the offence was stated, I should have thought there could have been no doubt as to its sufficiency, and that the objection was not substantial. The two cases read together lend no support to the view that, where the offence is not definitely charged so as to be sufficiently identified, the objection in arrest of judgment cannot be taken after the verdict. If the indictment is in such a form that it does not charge an offence, the Court cannot allow an amendment to remedy the defect: *Regina v. Flynn* (1878), 18 N.B.R. 321. This authority would probably not apply except in the case of an indictment before a grand jury, in which case it would have to be referred back to the grand jury for their approval.

What was required in the present case was not an amendment but a completed charge creating an offence under the Act.

The latest decision where duplicity has been held fatal in a conviction is that of *Rex v. Hammick, Ex p. Murdoch*, [1918] W.N. 111, where a conviction was quashed, two offences having been committed and included in one charge.

I think, therefore, that question 3 submitted, "Was the indictment bad for uncertainty or for having charged in one count more offences than one?" should be answered, "Yes, bad on both grounds."

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I have grave doubt as to whether the offence charged was in fact proven, having regard to the undoubted character of the girls with whom the offence is said to have been committed. There was, I think, some evidence of corroboration, very unsatisfactory, but possibly sufficient. However, in the view I take, it is unnecessary to answer questions 1 and 2.

I am of opinion that the conviction should be quashed and the prisoner discharged.

HODGINS, J.A.:—Unless the Court is to give an unusual and restricted meaning to the word “procure” the offence charged appears to come within sec. 216, sub-sec. 1. The section reads: “Every one is guilty . . . who (a) procures or attempts to procure or solicits any girl or woman to have unlawful carnal connection, either within or without Canada, with any other person or persons.”

Under the provisions of the corresponding English Act, the offence can be committed only in respect to a girl or woman (1) under 21 and (2) not being a common prostitute or (3) of known immoral character, and the word “solicits” is not used as part of the description of the offence.

This limitation may have had its influence in defining in the minds of some earlier Judges the nature of the crime. But under our Criminal Code the offence may be committed in respect to any girl or woman. It is not for the Court to cut down the effect of the provision by refusing to affirm a conviction because the girl here was a prostitute. It makes the crime less shocking than when an innocent girl is ensnared, but it does not alter its nature in any way.

“Procure” is used in sec. 215, and in several sub-sections of sec. 216, in such phrases as “procures . . . to have,” “procures . . . to become,” “procures . . . to come,” “procures . . . to leave,” and evidently is so used in its usual meaning, i.e., to cause, to bring about, to induce.

Coke, quoted in Russell on Crimes, 7th ed., p. 116, foot-note (r), says in speaking of forgery (3 Inst. 169) that to *cause* is to procure or counsel.

The expressions “aid, abet, counsel, or procure,” “procure a miscarriage,” and “procure a libel to be published,” are well-

known illustrations of the ordinary meaning of the word in criminal enactments.

In the Century Dictionary, quoted by the Court in *United States v. Somers* (1908), 164 Fed. Repr. 259, 262, the word "procure" is defined as "to bring about by care and pains; effect; contrive and effect; induce; cause; as, he *procured* a law to be passed."

In *The People v. Van Bever*, 248 Ill. 136, 141, the Supreme Court of that State held that "procure" for the purpose of prostitution meant "begin proceedings; to cause a thing to be done." In *Vogel v. The State* (1909), 138 Wis. 315, 332, the Supreme Court of Wisconsin regarded the word as synonymous with "aid," "abet," "obtain by any means," "to bring about."

The Imperial Dictionary, quoted in *Re Gertie Johnson* (1904), 8 Can. Crim. Cas. 243, gives "procure" as meaning "induces to do something;" and in England in *Rex v. De Marny*, [1907] 1 K.B. 388, and in *Rex v. Mackenzie* (1910), 6 Cr. App. R. 64, it seems to have been treated as having a meaning such as I have indicated.

Turning to the law of contracts, the word "procure" is used with just the same meaning as it bears in criminal law and under our Criminal Code. Lord Watson in *Allen v. Flood*, [1898] A.C. 1, at p. 96, defines the cases in which a person who "procures" the act of another can be made responsible. These cases are where that person "induces" the other to commit an actionable wrong or induces him by illegal means to do so to the detriment of a third person, and through all the cases which followed *Allen v. Flood* the word "procure" stood for "cause" or "induce." This meaning is helped by the addition of the words "or solicits," used in sec. 216 (1) (a), by which a light is thrown on the employment of the word "procure."

Having regard to the usual meaning of this word, the evidence of Bailey and Poirier that the prisoner frequently approached them for the purpose of getting them to accompany him and other men in his motor so as to have carnal connection with these men, and that they did both on many occasions, and the detailed accounts of three trips of that kind; shew that the prisoner did "procure" or "solicit" these two girls at various times separately and together to have carnal connection with other men.

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This is, according to any of the meanings I have quoted, exactly what the statute says shall render a person guilty of the offence in question.

The prisoner did not merely provide the means to enable these women and men to gratify their desires. He went further, and induced, caused, or brought about by solicitation the having of improper intercourse, quite apart from the use of the motor as a means of transportation. It was what the prisoner did and said that procured, and he was not a mere passive link in a chain—such as an ordinary cab-driver or motor-driver would be.

I would answer question 1 in the affirmative.

As to questions 2a and 2b these must be considered in connection with 3. As to question 3, this point is covered in *Rex v. Thompson*, [1914] 2 K.B. 99, where an indictment for incest in practically the same language was held bad for duplicity. I think, however, that that case warrants this Court in holding that sec. 1019 of the Criminal Code may be applied. It is not shewn here that the prisoner was in any way prejudiced or embarrassed, nor is it suggested. During the trial offences were proved on specific occasions, as to the identity of which there could be no reasonable doubt and on which evidence was fully heard. Apparently the prisoner did not testify.

Under the Interpretation Act, R.S.C. 1906, ch. 1, the plural “girls” in the indictment includes the singular (sec. 31 (j)).

The question as to corroboration occasions more difficulty. What, under sec. 1002, such corroborative evidence must amount to, is definitely settled by the Court of Criminal Appeal in England in *Rex v. Baskerville*, [1916] 2 K.B. 658, 667, where it is defined as “independent testimony which affects the accused by connecting or tending to connect him with the crime.”

On examining the specific occasions mentioned in the stated case, they resolve themselves into three. In the first, Bailey was procured in Hull and the offence completed there. In the second, the procuring was in Ottawa, but the offence was not completed, because Bailey did not have connection with either of the men: *Rex v. Mackenzie* (ante). In the third, Poirier was procured in Ottawa, and the offence was actually completed by her, and she was paid, dividing with Quinn.

This latter offence is amply corroborated by the evidence of Bailey as tending to implicate the prisoner, who is thereby shewn to have been carrying on a system of procuration of the kind sworn to by Poirier, although in the two specific cases the prosecution fails for want of jurisdiction in one and for want of proof of the offence in the other.

Question 2a should be answered in the negative, and question 2b in the affirmative.

Question 3 also in the affirmative, but cured by sec. 1019.

The conviction should therefore be affirmed.

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*Conviction quashed; HODGINS, J. A., dissenting.*

[FALCONBRIDGE, C.J.K.B.]

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July 26.

CAMPBELL v. MAHLER.

*Contract—Formation—Sale of Goods—Telegrams—Agents' Bought and Sold Notes—Statute of Frauds—Evidence—Letter Repudiating Contract—Omission of Statement of Time for Payment—"Shipment Opening Navigation"—"Terms Usual"—Custom of Trade—Immediate Payment where Shipment Deferred—Breach of Contract by Vendors—Damages—Costs.*

The defendants' agents in Alberta, on the 14th October, 1914, telegraphed to the defendants, who carried on business in Ontario, that they (the agents) had sold to the plaintiffs a car-load of apples "choice winter pack at five cents for fifties, five and a quarter for twenty-fives, including commission, shipment opening navigation, they will pay insurance." On the 16th October the defendants answered, "Accept price." On that day the agents sent the defendants a bought note, which stated the terms of the contract as in the telegram, with the addition of: "Price f.o.b. East. Terms usual. Shipping instructions, opening navigation 1915." A bought note was also sent to the plaintiffs. On the 20th October, the defendants wrote to the agents: "I will return contract, as I find you have worded contract 'opening of navigation 1915.' I will not accept contract on these terms unless they will pay for the goods when packed—I will store them gratis. . . . I will accept contract, providing they will pay for car when packed, and allow you commission."—

*Held*, that, if the terms of the contract had not sufficiently appeared by the telegrams and the bought note, the letter of the 20th October would have supplied a sufficient memorandum to satisfy the Statute of Frauds—none the less so that it contained a repudiation of the contract.

The question is not one of the intention of the person signing the contract, but merely of evidence against him.

*Bailey v. Sweating* (1861), 9 C.B.N.S. 843, followed.

*Held*, also, that the contract was complete notwithstanding that the particular mode or time of payment was not stated.

*Valpy v. Gibson* (1847), 4 C.B. 837, followed.

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*Held*, also, that "shipment opening navigation" could mean nothing but the opening of navigation in 1915; and, if the defendants failed to grasp the meaning of the despatch, that did not affect the validity of the contract.

*Held*, also, that there was no evidence—of a custom of trade or otherwise—that "terms usual" meant that payment should be made at the time of sale, without waiting for the time of shipment.

*Held*, therefore, that there had been a breach of the contract by the defendants, and the plaintiffs were entitled to damages, but to nominal damages only; when the plaintiffs found that the defendants would not carry out the contract, they should have gone into the market and done the best they could with a similar contract; and there was no evidence of any particular rise in prices before March, 1915.

The plaintiffs were awarded \$5 damages with costs on the County Court scale; no set-off was allowed to the defendants, who had broken their contract without any reasonable or valid excuse.

ACTION for damages for breach of an alleged contract for the sale by the defendants to the plaintiffs of a car-load of apples.

The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at London.

*G. S. Gibbons*, for the plaintiffs.

*R. G. Fisher*, for the defendants.

July 26. FALCONBRIDGE, C.J.K.B.:—The plaintiffs, carrying on business at Calgary, claim to have bought through the defendants' agents, Nicholson & Bain, from the defendants, one car of apples, which they say the defendants refused to ship in accordance with the contract, and the plaintiffs complain that they suffered damage.

The contract is said to be evidenced as follows:—

Night-lettergram, Nicholson & Bain to the defendants:—

"Calgary, Oct. 14/14.

"Sold Campbell car choice winter pack at five cents for fifties five and a quarter for twenty-fives including commission shipment opening navigation they will pay insurance rush answer."

The defendants answered as follows:—

"Oct. 16.

"Accept price. Must secure quarter higher next car." Only the first two words refer to this matter.

On receipt of this telegram, Nicholson & Bain sent the following note to the defendants:—



"Calgary, Alta., Oct. 16/14.

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"Messrs. L. Mahler & Sons,

"Strathroy, Ont.

"We have this day sold for your account to Campbell Wilson & Horne Ltd. 1 car choice winter pack evaporated apples

50s at 5c. per lb.

25s " 5¼c. " "

"Insurance payable by Messrs. Campbell Wilson & Horne Ltd.

"Price f.o.b. East.

"Terms usual.

"Shipping instructions—opening navigation 1915.

"Yours truly

"Nicholson & Bain

"agents."

A bought note, presumably in similar terms, was sent to the plaintiffs.

On receipt of the sold note, the defendants sent the following letter to Nicholson & Bain:—

"Strathroy, Ont., Oct. 20, 1914.

"Nicholson & Bain,

"Calgary, Alta.

"Gentlemen: Just received contract—Messrs. Campbell Wilson & Horne. I will return contract, as I find you have worded contract 'opening of navigation 1915.' I will not accept contract on these terms unless they pay for the goods when packed—I will store them gratis.

"Your message reads 'Sold Campbell car choice winter pack at five cents for 50 five and quarter for 25 including our commission shipment opening navigation they will pay insurance.' I did not just understand your telegram this way. You omitted putting the words 1915 in telegram, but you have contract to read more clearer. I did not understand telegram that way. However I will accept contract, providing they will pay for car when packed, and allow you commission.

"Yours truly,

"L. Mahler & Son."

There are two things noticeable in this letter, the first being that, if the terms of the contract had not sufficiently appeared by the telegrams and the bought note, this letter would supply a

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sufficient memorandum under the Statute of Frauds, none the less so that it contains a repudiation of the contract by the defendants.

The question is not one of the intention of the person signing the document, but merely of evidence against him. See *Bailey v. Sweeting* (1861), 9 C.B.N.S. 843, and other cases cited in Benjamin on Sale, 5th ed., pp. 266, 267.

The omission of the particular mode or time of payment does not necessarily invalidate a contract of sale. Goods may be sold and frequently are sold when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by future agreement or to be determined by what is reasonable: *Valpy v. Gibson* (1847), 4 C.B. 837.

Correspondence between the defendants and Nicholson & Bain continued up to the end of the year 1914, the defendants always demanding payment for the car when packed, but eventually offering to take payment as of the 1st January, 1915. The plaintiffs always insisted upon their contract, and now bring this action for damages for breach thereof.

The contention of the defendants that "shipment opening navigation" could mean anything but the opening of navigation of 1915 is perfectly absurd, and if they failed to grasp the obvious meaning of the despatch their alleged misapprehension cannot affect the validity of the contract.

The second remark which I have to make as to the defendants' letter of the 20th October and of their subsequent letters is the failure to assert or raise any contention that "terms usual" in a bought note would mean immediate payment. The defendants are always endeavouring to ask for payment before the time of shipment of the apples, but they never assert it as a right. I mention this particularly because at the trial some effort was made to prove a custom of the trade that, on this sort of contract, payment should be made at the time of the sale, without waiting for the time of the shipment. It is very seldom that there is any satisfactory evidence in this country of custom of trade. Generally, when a witness speaks of custom of trade, he really means to speak of the practice which he follows, and endeavours to get other people to follow, in his own business. For example, in this case the witness Finch, who buys and sells evaporated apples, says that the

custom "*we claim*" is cash, and Albert Sinclair, another witness of the same class, says as to the phrase "terms usual," "I would expect pay at the time they were sold, although the goods might be kept for a while by the vendor."

I find, therefore, that this attempt to give a meaning to "terms usual" is a mere afterthought and has no foundation in fact.

The plaintiffs, therefore, are entitled to succeed, but I find much difficulty on the question of damages. There was an absolute repudiation of the contract in the defendants' letter of the 20th October, 1914; and, although correspondence continued, and the defendants were willing, as I have said before, to accept payment as of the 1st January, yet the plaintiffs' position was always clear and steadfast, viz., as holding on to their contract.

I do not think, however, that they have any right to assert that the measure of damages is the price which they had to pay at the time of shipment of the apples, say from the middle of April to the middle of May, 1915. When they found that the defendants would not carry out the contract, they ought then to have gone into the market and done the best they could with a similar contract.

There is no evidence, except of the most general kind, given on the plaintiffs' behalf of any particular rise in price from that time on up to the end of the year, and one of the defendants swears that he could have bought at a little less when he objected to the contract, and that the prices remained low up to March, 1915, when they went up about 2 cents.

I am of opinion, therefore, that the plaintiffs are entitled only to nominal damages. There will be judgment for them for \$5 damages and costs upon the County Court scale, without any set-off of costs. The defendants broke their contract without any reasonable or valid excuse, and that is why I deprive them of the set-off of costs.

The case is at best not a very heavy one, or I might have felt inclined to give the plaintiffs a reference at their own risk and expense, to shew what the ruling prices were from the end of October to the end of the year.

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[APPELLATE DIVISION.]

July 30.

LE PAGE v. LAIDLAW LUMBER CO. LIMITED.

*Costs—Action for Balance of Price of Goods—Dispute as to Quantity Sold—Findings of Fact of Trial Judge—Failure of Plaintiff on Main Issue—Recovery of Small Sum—Plaintiff Ordered to Pay Defendants' Costs—Discretion of Trial Judge—Judicature Act, secs. 24, 74 (1)—Appeal.*

The plaintiff sued the defendants for \$1,432.65, the balance of the price of a stock of glue which he alleged he had sold to the defendants. There was a dispute between the parties as to the quantity of glue that had been sold. The glue was in two lots, one a small lot, upon the plaintiff's own premises, the other a larger lot, in a warehouse. Both lots were sent to the defendants; they refused to accept the larger lot, and endeavoured to return it, but the plaintiff would not receive it back. The trial Judge (there was no jury) gave judgment for the plaintiff for the price of the small lot only, \$162.85, and directed that the plaintiff should pay the defendants' costs of the action, less the \$162.85:—

*Held*, upon appeal, that the finding of the trial Judge upon the evidence could not be disturbed, and the Court could not interfere with his discretion as to the costs: secs. 24 and 74 (1) of the Judicature Act, R.S.O. 1914, ch. 56.

Discussion of the extent of the discretion of the Court as to costs and reference to authorities.

AN appeal by the plaintiff from the judgment of MIDDLETON, J., who tried the action without a jury at Toronto, directing that the plaintiff should recover \$162.85, and should pay the defendants' costs of the action, less the sum recovered.

The action was brought to recover \$1,649.20 for 4,712 lbs. of glue at 35 cents per lb., less contra-account of \$216.55, balance \$1,432.65.

The defendants denied that they had bought this quantity of glue, alleged that they agreed to accept only sufficient glue to balance the \$216.55 which the plaintiff owed them, and that it was part of the agreement that the defendants would pay for any trifling addition "so as not to break a bag" to get the exact quantity to equal the balance.

By the appeal the plaintiff sought to recover the full sum sued for, \$1,432.65, with his costs of the action.

June 14. The appeal was heard by MULOCK, C.J. EX., CLUTE, SUTHERLAND, and KELLY, JJ.

*I. F. Hellmuth*, K.C., for the appellant, argued that the evidence of the appellant, being corroborated by that of his stenographer, should have been accepted as against that of Shaw, whom the learned trial Judge did not see, as to what was the bargain between

the parties. This Court was in as good a position as the learned trial Judge to deal with this question of fact. The general rule that a court of appeal should not reverse the findings of fact of a trial Judge when the testimony of the witnesses is contradictory is not an absolute one: *Bostrom v. Atkinson*, [1918] 1 W.W.R. 591; *Slingsby v. Attorney-General* (1916), 32 Times L.R. 364, citing *Coghlan v. Cumberland*, [1898] 1 Ch. 704. In any event, the learned trial Judge should have allowed the appellant the costs of the action, as he had been the successful party: *Thomson v. Denny*, [1918] 1 W.W.R. 435, 39 D.L.R. 421; *Buckley v. Vair* (1917), 40 O.L.R. 465, 39 D.L.R. 796.

*H. J. Scott*, K.C., for the defendants, respondents, contended that the Court would not be justified in disturbing the findings of the learned trial Judge. Shaw's evidence was corroborated by that of Copeland, and had been rightly accepted in preference to that of the appellant. The costs of the action were in the discretion of the Judge, and his disposition should not be disturbed: Judicature Act, secs. 24, 74.

*Hellmuth*, in reply.

July 30. SUTHERLAND, J.:—The defendant company had been supplying lumber to the plaintiff, H. T. LePage, doing business under the name of The LePage Individual Communion Cup Company, and in April, 1917, he was owing an account amounting to \$553 or thereabouts.

The plaintiffs, owning some glue, proposed to the defendants, and it was agreed, that the latter should buy some of it and deduct the price from their bill. This was done, reducing the account to \$200.

The defendants were pressing for payment thereof, and the plaintiff, being unable apparently to make it otherwise, offered to sell some glue, at least enough to settle the account. In letters which passed between the parties in April and May, the defendants intimated that they did not require or desire to purchase more. Telephone communications also passed between the plaintiff and Copeland, an employee in the defendants' office who looked after their accounts. The plaintiff in the end got in touch with Shaw, the assistant to the general manager of the defendant company, who, on the 23rd May, went to the plaintiff's place to look at the glue.

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At this time the latter owned two lots of glue, one in his own premises, which Shaw saw, and another in the warehouse of a Mr. Ward, which he did not see.

The plaintiff testified that on this occasion a bargain was made between him and Shaw, whereby the latter agreed, on behalf of the defendant company, to purchase the two lots at 35 cents a pound. Shaw, in his evidence taken *de bene esse*, gave a very different version of the transaction, and stated that all he agreed to do was to recommend to the defendant company to purchase sufficient glue to settle the account. He says that, in addition, he did tell the plaintiff that, as the glue which he saw was in sacks, when it came to the adjustment a sack need not be broken, and the defendants would take the whole of it, as a partly filled sack was "neither here nor there."

Admittedly it was arranged that the defendants should send their carter for the glue with a blank order, and that, upon it being weighed, the amount thereof was to be inserted therein. The carter was sent, but apparently without sufficiently explicit instructions, and the plaintiff delivered to him the glue in the two lots, amounting in all to 4,712 lbs., and it was conveyed to the defendants' premises.

Two holidays intervened between the 23rd and the 28th May; and, partly owing to this and partly to the fact that Shaw was absent, the error was not discovered until the latter date. The defendant company immediately wrote to the plaintiff, pointing out that there had apparently been a misconception on his part as to the amount of glue purchased, that their own understanding was that they were to take enough to "clean up the account which you owe us, at 35 cents per pound;" that an invoice had been sent to them for 4,712 lbs., amounting to \$1,649.20; that they did not want that much glue, but only enough to pay their account against the plaintiff, then amounting to \$216.55, and that the balance was in their premises awaiting the plaintiff's orders. They also returned the invoice and informed the plaintiff that, when the glue was taken away, he could send a new one for the proper quantity. The plaintiff replied that the defendants were in error, and that Shaw had bought all the glue. Thereupon the defendants weighed out enough glue at the price mentioned to equal in value the amount of their account, and Shaw had the balance loaded on a motor-truck,



went with it to the plaintiff's place of business, and attempted to deliver it. The plaintiff refused to receive it, or to permit it to be unloaded, and it was taken back to the warehouse of the defendants, where it remained.

In his judgment, Middleton, J., states: "The evidence shews beyond doubt that LePage did not intend to sell, nor did Shaw (representing the defendant company) intend to purchase, the quantity of glue that was stored in Ward's warehouse. There is some difficulty in determining exactly where the line was drawn as between the amount that was required to pay the account owing by the plaintiff to the defendant company, in full, and the purchase of the entire balance of the glue alleged to have been in the warehouse, and to have been seen and examined by Shaw;" and he further says: "So that, while I give judgment in favour of the plaintiff for the full amount, it does not affect the question of costs." By "the full amount," he means the amount of glue which was, at the time of the alleged contract, in the plaintiff's own warehouse. His judgment is to the following effect:—

The amount on the floor less 3 bags not delivered,	
1,084 lbs. at 35 c. per lb.....	\$379.40
Amount due on current account up to date.....	216.55
	<hr/>
Balance.....	\$162.85

The plaintiff therefore obtained judgment against the defendant company for \$162.85, but was directed to pay the costs of the litigation, less that sum, and the defendant company were directed to deliver the glue, less the 1,084 lbs.

It is contended on this appeal that the evidence of the plaintiff, being corroborated in part by his stenographer, should have been accepted as against that of Shaw on the question of the bargain between the parties. Having regard, however, to the previous correspondence and the evidence of Copeland, one can quite well understand why the trial Judge preferred to credit Shaw rather than the plaintiff. His findings of fact on the contradictory evidence in this case it would not, in my opinion, be proper for us to disturb. In fact, in requiring the defendants to retain all the lot of glue in the plaintiff's own premises, he has gone to the full limit in his favour. While the plaintiff obtained a judgment for the amount

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named, it seems reasonably clear that, if he had been at all willing before action to meet the reasonable proposals for a settlement made to him by the defendant company, no suit would have been necessary. He brought his action for the sum of \$1,432.65, the difference between the \$1,649.20 and the \$216.55. The defendants have in reality substantially succeeded. While they are required to pay the sum stated, they retain glue to that amount.

It was contended, however, that in any event the trial Judge erred in not allowing the plaintiff the costs of the action.

In *Andrews v. Barnes* (1888), 39 Ch. D. 133, at p. 138, Fry, L.J., lays down the rule obtaining in England:—

“The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. ‘The giving of costs in equity,’ said Lord Hardwicke in *Jones v. Coxeter* (1742), 2 Atk. 400, ‘is entirely discretionary, and is not at all conformable to the rule at law,’ ‘Courts of Equity,’ said the same great Judge in another case, ‘have in all cases done it’ (i.e., dealt with costs) ‘not from any authority’ (i.e., as we understand, from any statutory or delegated authority)—‘but from conscience and *arbitrio boni viri*, as to the satisfaction on one side or other on account of vexation.’ *Corporation of Burford v. Lenthall* (1743), 2 Atk. 551.”

And the late Chancellor in *McAllister v. McMillan* (1911), 25 O.L.R. 1, dealing with the costs of an action to set aside a will, also said (p. 4): “The common law rule is, that the loser is to pay the costs; the equity rule is, that costs are in the inherent power of the Court to deal with;” citing also *Corporation of Burford v. Lenthall*, *supra*.

In *Kierson v. Joseph L. Thompson & Sons Limited*, [1913] 1 K.B. 587, it was held that the party who has been fully successful, and against whom no misconduct is alleged, cannot be ordered to pay costs. Even if this latter principle were to be applied to the present case, it could not be said that the plaintiff was “fully successful.”

But, whatever the law might otherwise be, it is plain that under sec. 74 of our Judicature Act, which is as follows—“(1) Subject to the express provisions of any statute, the costs of and incidental to all proceedings shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid”—the

costs are solely in the discretion of the trial Judge; and, under sec. 24, his order as to the costs is not properly the subject of an appeal, except by his leave.

In *Buckley v. Vair*, 40 O.L.R. 465, 39 D.L.R. 796, it was held that an appellant could not, by joining with an appeal as to costs, an appeal as to other parts of the judgment, in which he fails, escape from the effect of that section. In a British Columbia case, *Thomson v. Denny*, [1918] 1 W.W.R. 435, 39 D.L.R. 421, it was held that, if good causes were found for depriving a successful party of costs, the Court was possessed of full discretion to make such order as to costs as it deemed just.

I am of the opinion that the trial Judge's disposition of the costs was a proper one.

I would dismiss the appeal with costs.

MULOCK, C.J. Ex., agreed with SUTHERLAND, J.

CLUTE, J.:—Appeal from the judgment of Middleton, J. The action was tried at a Toronto non-jury sittings, on the 19th February, 1918, and judgment given for the plaintiff for \$162.85. The plaintiff was directed to pay the costs of the litigation, less this sum.

The plaintiff's action was brought to recover the amount of \$1,649.20 for 4,712 pounds of glue at 35 cents per pound, less contra-account of \$216.55, claiming a balance of \$1,432.65.

The defendants denied that they bought this quantity of glue, claimed that they only agreed to accept sufficient glue to balance the indebtedness of the plaintiff to the defendants, \$216.55, and that it was part of the agreement that the defendants would pay for any trifling addition "so as not to break a bag" to get the exact balance.

The plaintiff appeals and seeks to recover the full amount sued for with his costs of action.

The main facts are not in dispute. The defendants were pressing the plaintiff for payment of the balance due him, namely, \$216.55. The plaintiff desired to meet this claim by selling them glue, a certain amount of which the defendants used in their business.

On the 24th April, the defendants enclosed a statement of their account, and further stated, "Our Mr. Shaw, at the west yard,

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advises us that there is no more glue required now." The plaintiff still desiring to sell the defendants more glue, the defendants wrote a letter on the 4th May, 1917, that they did not want any more at the present or in the near future, and again asked for a cheque to cover the account.

An interview then took place between the plaintiff and Shaw, acting for the defendants, and it is with reference to what took place on that occasion that the dispute has arisen. After the interview, the plaintiff billed the defendants with 4,712 pounds of glue at 35 cents a pound, \$1,649.20, contra-account \$216.55, leaving a balance claimed of \$1,432.65, and drew upon the defendants for this amount. The defendants refused to accept the draft, and in their letter of the 28th May to the plaintiff stated: "Evidently there has been some misunderstanding in regard to the amount of glue we were to purchase from you. Our understanding with you was that we were to take enough glue to clean up the account which you owe us at 35 cents per pound. We are not particular to a pound or two either more or less, and in making out the requisition we did not fill in the exact number of pounds. You have sent us an invoice for 4,712 pounds of glue, amounting to \$1,649.20. We do not want this glue. What we want is enough glue to amount to \$216.55, the amount on our contra-account, and the balance of the glue is in our warehouse awaiting your orders. We herewith return the invoice to you, and when the glue which we do not require is taken away you can send us a correct invoice for the proper amount."

To this the plaintiff replied on the 30th May that the defendants were entirely wrong in their contention: "We don't know what instructions you gave your Mr. Shaw as to how much glue he was to purchase, we only know he bought all the glue we had at 35 cents per pound. He asked the writer, our Mr. A. F. LePage, how much he had; I said I was not sure but there was from thirty to forty hundred or more; he then said, 'I will mail you an order for it and leave the number of pounds blank, you can fill that in when you weigh it up for delivery.' Your order 3614, May 18th, 1917, confirms this. He then arranged with me to deduct the amount of our account and make a thirty-day draft on your firm for the balance. He sent over the following week for the glue, got one load, and sent the man back for the balance. On May the 23rd

we made a draft for the balance as agreed. Please find statement. This letter confirms our Mr. LePage's conversation with your Mr. Copeland in your office yesterday."

The evidence of Mr. Shaw, referred to, was taken *de bene esse*. The learned trial Judge finds "that the evidence shews beyond doubt that LePage did not intend to sell, nor did Shaw, representing the defendant company, intend to purchase, the quantity of glue that was stored in Ward's warehouse."

The learned trial Judge allowed for the amount of glue upon the plaintiff's floor, namely, 1,084 pounds at 35 cents, making \$379.40, from which he deducted the amount due to the defendants on current account \$216.55, and he gave judgment for \$162.85. He says: "There will therefore be judgment in favour of the plaintiff for \$162.85. The plaintiff will pay the costs of the litigation, less this sum, and the defendants will deliver up the glue, less the 1,084 pounds for which they are being charged in this judgment."

It was urged by Mr. Hellmuth that the plaintiff's evidence was fully corroborated by Marie Brown, the stenographer, and that the trial Judge was not justified in accepting the uncorroborated evidence of Mr. Shaw, whom he did not see, and that this Court, therefore, was in as good a position to deal with the question of fact as the trial Judge. I find, however, that Mr. Shaw is corroborated by Mr. Copeland, in the employ of the defendant company, who, although not present at the interview between Shaw and the plaintiff, says, "that after the letter of the 4th May written by him he had an interview with Mr. LePage—

"Q. To what effect? A. Well, the later effect was that I consented to take enough glue from him to settle our account.

"Q. How did you carry that out? A. I telephoned to Mr. Shaw to go over and see the glue. Of course I do not know anything about the quantity or quality of the glue. I instructed Mr. Shaw to arrange with Mr. LePage to get enough glue to cover our account."

The view taken by the learned trial Judge is sufficiently supported by the evidence, and is, I think, more probable than the plaintiff's statement. The learned Judge gave, evidently, the benefit of the doubt to the plaintiff in charging the defendant with the whole amount on the floor of the plaintiff's warehouse. It is wholly improbable to me, upon the evidence, that the defendants

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purchased the full amount claimed to have been sold by the plaintiff. The finding of the trial Judge ought not to be disturbed.

There remains only the question of costs.

Under sec. 74 (1) of the Judicature Act, the costs of and incident to all proceedings shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid. This section corresponds to Order XV., under which *Harris v. Petherick* (1879), 4 Q.B.D. 611, was decided. The plaintiff there sued for £85 and also for 6s. On the first trial he was nonsuited, and a new trial was ordered. At the second trial he failed as to his claim for £85, but proved his claim for 6s.; the Judge ordered that the plaintiff should pay the costs of both trials. Held, that the order was right.

In *Forget v. Ostigny*, [1895] A.C. 318, costs of both parties was directed to be paid by the successful applicant, special leave having been given to him under special circumstances, notwithstanding the small amount at stake.

In *Fielden v. Cox* (1906), 120 L.T.J. 521, the defendant brought into Court the sum of 1s. Upon the facts of that case, it was held that it was not a case for an injunction, and that the plaintiff was entitled to 1s. damages, but he must pay the defendant's costs.

In *Re Rotch* (1909), 127 L.T.J. 617, it was held that the law is as stated in *Bew v. Bew*, [1899] 2 Ch. 467, 81 L.T.R. 284, that the Court of Appeal would assume that the Judge exercised his discretion unless satisfied that he did not do so, but applied some rule which excluded the exercise of his discretion. See *Estcourt v. Estcourt Hop Essence Co.* (1875), L.R. 10 Ch. 276. See also *Vipond v. Sisco* (1913), 29 O.L.R. 200, 14 D.L.R. 129; Holmsted's Ontario Judicature Act, 4th ed., pp. 251-3.

The learned trial Judge having found upon sufficient evidence that the plaintiff did not intend to sell nor the defendants to buy the quantity of glue that was stored in Ward's warehouse and forming much the larger part of the plaintiff's claim, it follows that the plaintiff has failed as to that which was the real bone of contention between the parties, namely, the large quantity of glue in Ward's warehouse; and there can be no doubt that the trial Judge intended to and did exercise a discretion in regard to the costs and their disposition which he made. The circumstances are peculiar. The



litigation was unnecessary, caused wholly by the plaintiff. I see no ground for interfering. The appeal should be dismissed with costs.

KELLY, J.:—Irrespective of what is urged as to the disposition of the costs of the action, in substance the appellant's contention is that the learned trial Judge erred in giving the effect he did to the evidence as a whole, and particularly to that of the witness Shaw. The real controversy at the trial was over the quantity of glue which the defendants agreed to take from the plaintiff in the negotiations for settlement of the account overdue by the latter to the defendants.

On an analysis of the whole evidence, I find it impossible to say either that the trial Judge failed to give due consideration to any part of it or that he went beyond what was his privilege in accepting the evidence of any one witness or set of witnesses as against that of others.

Emphasis was laid upon the corroboration afforded by the testimony of Marie Brown, who was the plaintiff's bookkeeper at the time of the negotiations. Her evidence does not go beyond this, that there was in her presence a conversation between LePage and Shaw about a settlement in which she says mention was made of deducting the account (the plaintiff's) and making a thirty-day draft on the defendants for "the balance," but she admits she just heard the remarks she swore to, and did not know at the time what the conversation had reference to. It was not made clear in her presence what was meant by "the balance." Her story does not necessarily imply that it referred to all the plaintiff's glue now claimed for, because it appears that, rather than break into a sack of glue, there was in the mind of Shaw at least the prospect of the defendants having to take more glue than the actual and exact quantity necessary to settle the overdue account. It should be observed, too, that, according to her, it was after the conversation above referred to that LePage, when Shaw turned to go out of the door, asked Shaw if he would like to go over to the warehouse and "see the balance of the glue," an inquiry which brought from Shaw the question, "How much have you?" to which LePage replied, "About 3,000 or 4,000 lbs., or perhaps more, I am not sure." That

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was, as far as her evidence goes, the first express reference made to the total of the glue; evidently Shaw was not, up to that time, aware of what the quantity amounted to. Is it probable that he would have consented that a draft should be put through on the defendants for the price of the whole balance of what the plaintiff had in stock, when he was unaware, even in a general way, of what that amounted to? Is it not more probable that, under these circumstances, the conversation about the draft had reference to the balance of the contents of the sack in excess of what it would be necessary to take out of that sack to settle the plaintiff's overdue account?

I am of opinion, too, that the trial Judge violated no principle in disposing of the costs against the plaintiff. He evidently had in mind wherein the merits lay, having regard to the character of the action—the desire of the defendants to obtain payment of the overdue account and their acceding to the plaintiff's proposal that they should accept in payment glue in lieu of cash, and the further circumstance to which he specially alludes—that the real bone of contention between the parties was the alleged sale of the large quantity of glue in the warehouse, and as to which the plaintiff failed, on evidence which this Court cannot say was insufficient. That was the real substance of the action, and not the mere settlement for a quantity of glue sufficient to satisfy the overdue account, and in respect to which it is safe to say there would have been no dispute and no action but for the plaintiff's insistence that he was entitled to be paid as well for the additional quantity, to which the defendants all along objected. Imposing the costs upon the plaintiff was, under the circumstances, a mere exercise of the discretion given by sec. 74 of the Judicature Act.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

## [APPELLATE DIVISION.]

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## GARDNER V. MERKER.

*Sale of Goods—Action for Price—Counterclaim for Damages for Fraudulent Misrepresentation as to Value of Goods—Failure to Establish Fraud—Warranty as to Quantity—Affirmation at Time of Sale not Intended as Warranty—Construction of Contract—Sale or Bailment—Judgment of Trial Judge—Appeal by Defendants—No Appeal by Plaintiff—“Judgment not Judicial”—“Equitable on Facts.”*

The plaintiff sued for \$760, the balance of the price of a quantity of junk sold by him to the defendants for \$1,500. The defendants alleged that the plaintiff falsely and fraudulently represented the junk as worth \$2,000 or at least \$1,800, and that, induced by this representation, they executed the agreement of purchase; that they sold all the junk but a small quantity, and realised only \$800; and they counterclaimed \$2,000 damages. The junk was not sold by description or sample; it was inspected by the defendants. The trial Judge found that the representation was made and that the defendants acted upon the faith of it, but did not find that it was fraudulent; he gave judgment for the plaintiff for \$200 and dismissed the counterclaim. The defendants appealed; the plaintiff did not appeal:—

*Held*, upon the evidence, that the defendants had failed to establish fraud.

*Held*, also, that while an affirmation at the time of the sale is a warranty, provided it appears on evidence to be so intended—which intention is to be deduced from the whole of the evidence—and there may be a warranty as to quantity—the evidence in this case did not shew that the representation made was intended to be contractual respecting the accuracy of the statement; it was in fact nothing more than the opinion or estimate or belief of the vendor, the plaintiff.

*Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394, *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30, and *Chanter v. Hopkins* (1838), 4 M. & W. 399, followed.

*Per RIDDELL, J.*:—The contract was one of sale of goods with precautions provided for the security of the vendor—not a contract of bailment by which the defendants were not bound to pay more than the goods would bring, as contended by the defendants.

*Per Curiam*:—There being no fraud and no warranty, the plaintiff was entitled to recover the balance of the purchase-price; but, as he had not appealed from the judgment for \$200, that judgment must stand.

Remarks by RIDDELL, J., on the course adopted by the trial Judge in giving a “judgment not judicial” but “equitable on the facts.”

The plaintiff sued in the County Court of the County of Hastings for \$760.60, the balance of a sum of \$1,500, the purchase-price of a quantity of junk sold by him to the defendants.

The defendants set up that, knowing the amount and the value thereof at the current market price, the plaintiff falsely and fraudulently represented the junk as worth \$2,000 and the lowest possible price as \$1,800, and that, induced by this false and fraudulent representation, they executed the agreement of purchase; that they sold all the junk but a small quantity; that it realised only \$800; and they counterclaimed for \$2,000 damages.

The trial Judge gave judgment for the plaintiff for \$200 and dismissed the counterclaim.

The defendants appealed.



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April 10. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. J. Elliott, for the appellants, argued that the transaction was in reality a bailment, and the defendants were called upon to pay only what they could sell the goods for; it was not a sale, and it should be set aside as fraudulent. The learned County Court Judge should have given judgment for breach of warranty, and the defendants should have got all the damages flowing from the breach—about \$1,000. [RIDDELL, J.:—Where is the warranty?] A collateral verbal statement that there was \$1,800 or \$2,000 worth of junk in the pile, whereas there was only one half of that. The representations as found amounted to a warranty: *Harrison v. Knowles*, [1917] 2 K.B. 606; *De Lassalle v. Guildford*, [1901] 2 K.B. 215; *Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394; Halsbury's Laws of England, vol. 20, para. 1717.

H. S. White, for the plaintiff, respondent, contended that, as the memorandum shewed, the transaction was a sale, and not a bailment merely. There was no warranty. The representation as to the value of the junk was a mere statement of opinion. It was an innocent misrepresentation as to quantity. There was no fraud, and therefore the defendants could not succeed: *Angus v. Clifford*, [1891] 2 Ch. 449; *Scott v. Sprague's Mercantile Agency of Ontario Limited* (1904), 4 O.W.R. 454; *Seddon v. North Eastern Salt Co. Limited*, [1905] 1 Ch. 326; *Lecky v. Walter*, [1914] 1 I.R. 378; *Grant Campbell & Co. v. Devon Lumber Co. Limited* (1914), 7 O.W.N. 209. As soon as the defendants found that the representations were untrue, they should have elected to rescind or to go on with the contract. They went on after they knew, and now they cannot rescind.

Elliott, in reply.

July 30. CLUTE, J.:—Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Hastings, for the plaintiff for \$200 and costs. The claim is for \$760.60, balance on a sale of junk for \$1,500. The defendants allege that the plaintiff represented that the stock was worth at least \$1,800, and that this representation was false and fraudulent.

The agreement was in writing, and provided that, as collateral security, the plaintiff should be paid, out of the proceeds of the

sale of the junk, to the extent of the purchase-price, \$1,500. The writing, however, does not contain the allegation that the junk was worth at least \$1,800, or any reference to the value of the junk.

The learned trial Judge finds that the representation was so made and that the defendants acted upon the faith of such representation, but does not find that it was fraudulent; he entered a compromise verdict for the plaintiff for \$200, and left, as he says, the question of law to the Court of Appeal. There is no appeal by the plaintiff from this judgment.

The defendants on this appeal accept the finding of the trial Judge, and submit that the representation as found amounted to a warranty, and cite *Harrison v. Knowles*, [1917] 2 K.B. 606; *De Lassalle v. Guildford*, [1901] 2 K.B. 215.

*Harrison v. Knowles* was a case of the sale of two ships, in which, in the particulars in writing furnished the plaintiffs, it was stated that the dead-weight capacity of each ship was 460 tons, when in fact it was only 360 tons. This statement as to dead-weight capacity was not repeated in the memorandum signed by the parties. The first objection was that the plaintiffs having signed the memorandum could not be heard to say that the particulars furnished to them by the defendants formed a part of the contract between the parties. It was held on the evidence that the memorandum was not intended by the parties to contain all the terms of the contract, and that the statement as to the dead-weight capacity was a term of the contract, and that such parts of the defendants' particulars as were not inconsistent with the memorandum might be read into it: see *Edward Lloyd Limited v. Sturgeon Falls Pulp Co. Limited* (1901), 85 L.T.R. 162; that the statement was a warranty, the normal result of which would be that the defendants were entitled to damages, but, by reason of the words "not accountable for errors in description," the defendants were not liable for damages for breach of warranty.

There is no evidence in the present case that the written contract did not contain, and was not intended to contain, all the terms of the agreement. It is pointed out in the *Harrison* case that there are cases which seem to indicate that qualifying words such as are there used do not apply to actions for damages for breach of a condition: see *Wallis Son & Wells v. Pratt & Haynes*,

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[1911] A.C. 394; and it was decided in the *Harrison* case that the discrepancy between the statement and fact was a difference of degree and not of kind, and that the statement was therefore a warranty and not a condition.

The last case referred to (the *Wallis* case) was for the sale of seeds, and turned on the Sale of Goods Act. It was held in the Court below, [1910] 2 K.B. 1003, that the plaintiffs, having accepted and resold the seed, had put it out of their power to treat the description of the article sold as common English sainfoin as a condition, on a breach of which they were entitled to reject the goods, and could only treat it as a warranty, a breach of which would ordinarily entitle the purchaser to damages; but that, upon the true construction of the condition printed on the back of the sold note, the defendants had excluded all liability capable of enforcement by an action for breach of warranty; Fletcher Moulton, L.J., dissented.

The decision of the Court of Appeal was reversed upon the grounds given by the dissenting Judge. Lord Loreburn, L.C., [1911] A.C. at p. 395, says: "But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio*, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty. I forbear further observations, because the whole of the law has been, if I may say so with respect, admirably expressed in the judgment of Fletcher Moulton, L.J." It was held that the appellants were entitled to the remedies applicable to a breach of warranty and to recover from the respondents the damages which the appellants had been obliged to pay to the other parties.

In *De Lassalle v. Guildford* (*supra*), the terms of a lease were arranged, but the plaintiff refused to hand over the counterpart that he had signed unless he received an assurance that the drains were in order. The defendant verbally represented that they



were in good order, and the counterpart was thereupon handed to him. The lease contained no reference to drains. The drains were not in good order, and an action was brought to recover damages for breach of warranty. It was held that the representation made by the defendant that the drains were in good order was a warranty which was collateral to the lease, and for breach of which an action was maintainable. The jury negatived fraud and found no breach of covenant on the ground that due notice had not been given thereunder, but found the disputed facts relating to the alleged warranty in favour of the plaintiff, and the question is put by A. L. Smith, M.R., who gave the judgment of the Court (p. 218): "First, does what the jury have found to have been stated by the defendant, in the circumstances in which the statements were made, amount to a warranty in law, or only to a mere representation, in which case no action for damages can be maintained without proof of fraud? Secondly, if the statements found to have been made by the defendant amounted to a warranty, was such warranty a warranty collateral to the lease so as to be given in evidence and given effect to notwithstanding the lease?" And at p. 221: "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not."

This view of the law is not approved in *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30, as *per* Lord Moulton (head-note): "The question whether an affirmation made by the vendor at the time of the sale constitutes a warranty depends on the intention of the parties to be deduced from the whole of the evidence, and the circumstance that the vendor assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention, is not conclusive of the question. The dicta of Bayley, J., in *Cave v. Coleman* (1828), 3 Man. & Ry. 2, and of A. L. Smith, M.R., delivering the judgment of the Court of Appeal, in *De Lassalle v. Guildford*, [1901] 2 K.B. 215, at p. 221, cannot be supported."

Lord Moulton says in part, at pp. 48, 49: "In the history of

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English law we find many attempts to make persons responsible in damages by reason of innocent misrepresentations, and at times it has seemed as though the attempts would succeed. On the Chancery side of the Court the decisions favouring this view usually took the form of extending the scope of the action for deceit. There was a tendency to recognise the existence of what was sometimes called 'legal fraud,' i.e., that the making of an incorrect statement of fact without reasonable grounds, or of one which was inconsistent with information which the person had received or had the means of obtaining, entailed the same legal consequences as making it fraudulently. Such a doctrine would make a man liable for forgetfulness or mistake or even for honestly interpreting the facts known to him or drawing conclusions from them in a way which the Court did not think to be legally warranted. The high-water mark of these decisions is to be found in the judgment pronounced by the Court of Appeal in the case of *Peek v. Derry* (1887), 37 Ch. D. 541. . . . The opinions pronounced in your Lordships' House\* in that case shew that both in substance and in form the decision was, and was intended to be, a reaffirmation of the old common law doctrine that actual fraud was essential to an action for deceit, and it finally settled the law that an innocent misrepresentation gives no right of action sounding in damages. On the Common Law side of the Court the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation . . . But in respect of the question of the existence of a warranty the Courts have had the advantage of an admirable enunciation of the true principle of law which was made in very early days by Holt, C.J., with respect to the contract of sale. He says: 'An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended.' " He then refers to dicta inconsistent with this statement of the law (p. 50). "For example, one often sees quoted the dictum of Bayley, J., in *Cave v. Coleman*, where, in respect of a representation made verbally during the sale of a horse, he says that 'being made in the course of dealing, and

\**Derry v. Peek* (1889), 14 App. Cas. 337.

before the bargain was complete, it amounted to a warranty'—a proposition that is far too sweeping and cannot be supported. A still more serious deviation from the correct principle is to be found in a passage in the judgment of the Court of Appeal in *De Lassalle v. Guildford*," and he then quotes the passage above referred to, "In determining, etc.," and he then proceeds: "With all deference to the authority of the Court that decided that case, the proposition which it thus formulates cannot be supported."

Applying then the principle that an affirmation at the time of the sale is a warranty, provided it appears on evidence to be so intended, which intention is to be deduced from the whole of the evidence, I am of opinion that the evidence in this case does not shew that the representation made was intended by the parties to be contractual respecting the accuracy of the statement, but was in fact nothing more than the opinion or estimate of the vendor.

The plaintiff states that he asked in the first instance \$3,000 for the lot; that the defendant Merker went out and examined it and came back and offered \$1,500, which was accepted. The defendant Merker's evidence is in effect:—

"Q. Did you look at the stock? A. Yes.

"Q. Was he with you? A. Yes, he went around and shewed us the stock. I says, 'What do you think? He says, 'I think there is \$2,000 worth in that stock;' I says, 'We can't buy that stock because we have no money;' he says, 'Money would be no question, the only thing if you take and handle the stock you will make enough for your work;' I told him, 'If you think there is \$2,000 worth of stock the only thing we can give you is \$1,500;' that would leave \$500 for our work and expenses."

They then agreed upon the lease and went to a lawyer, Mr. Carnew, to have the document drawn. He states that he received instructions from both parties and prepared the agreement as they went along.

"Q. Was anything said between the parties as to the quantity of stuff they were buying? A. Yes, I think Mr. Gardner said at the time that they were perfectly safe in estimating the amount of junk and stock he had on hand as being a greater amount than \$1,500, but it was not a surety in any way; in my opinion, it was an estimate that Gardner had given of property that these men had all seen and had an opportunity of looking over."

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The agreement contains nothing about the amount of stock that was there. The instructions were given by both parties. They were both present. The price was mentioned. If it had been intended that the amount of stock was a condition or a warranty or in any sense a part of the contract it would probably have been inserted. There is no evidence that the agreement as drawn up was not intended by both parties to contain the terms of the contract.

From the evidence, I do not think this representation was intended by either party or both parties to be contractual. The plaintiff was asked for his opinion and gave it without fraud. This is not a case which arises when goods are sold by description, and the question is whether they answered to that description or not, which then becomes a condition of the contract. There being no fraud, the defendants fail upon that branch, and there is no condition or warranty proven to support their counterclaim.

The appeal should be dismissed with costs.

MULOCK, C.J. Ex., agreed with CLUTE, J.

RIDDELL, J.:—The plaintiff sues in the County Court of the County of Hastings, by a specially endorsed writ, for \$760.60, the balance of a sum of \$1,500, the purchase-price of some junk sold by him to the defendants. The defendants set up that, knowing the amount and value thereof at the current market price, the plaintiff falsely and fraudulently represented it as worth \$2,000 and the lowest possible price \$1,800, and that, induced by this false and fraudulent statement, they executed the agreement sued on; that they sold all the junk but a small quantity, and it produced only \$800: and they claim \$2,000 damages.

At the trial the plaintiff had a verdict for \$200; the defendants appeal.

Upon the argument of the appeal there were two contentions raised which do not appear upon the pleadings, viz.: (1) that the transaction was not a sale at all but a bailment; and (2) that the transaction should be set aside on the ground of fraud.

The first contention is based upon the form of the contract; it is made between the plaintiff of the first part and the defendants of the second part—"the party of the first part agrees to sell and

the parties of the second part agree to buy all the junk . . . for the price or sum of \$1,500 . . . the parties of the second part pay in cash the sum of \$25 and \$25 before any of the goods are removed . . . the parties of the second part agree to ship the goods in the name of the party of the first part and transfer all shipping bills or bills of lading necessary to place the title to the proceeds of the said goods wherever shipped in the name and for the interest and benefit of the party of the first part and agree to let the party of the first part receive all the proceeds of the sale of said goods and chattels until the sum of \$1,500 is fully paid, and after the payment of the said sum of \$1,500 all the said goods are to be and remain the property of the said parties of the second part, and all excess over and above the said payment to belong to the parties of the second part. The parties of the second part agree to proceed with due diligence in the sale of the said goods, and agree to complete the final payment on the said sum of \$1,500 within three months from the date without interest—should the parties of the second part not complete the payment, the party of the first part to have the right to be paid bank interest on whatever sum is still owing and unpaid.”

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The defendants, through their counsel, contend that the contract was one of bailment, by which they were not bound to pay more than the goods would bring—but, irrespective of the evidence of the solicitor whose evidence the learned County Court Judge believes, it is impossible so to interpret the writing; the contract was plainly one of sale of goods with precautions provided for the security of the vendor.

(2) Fraud has not been found, and we cannot find it; in the absence of fraud there can be no rescission, the contract being completely executed and the property having passed: *Seddon v. North Eastern Salt Co. Limited*, [1905] 1 Ch. 326. Even if fraud had been found, as it is impossible to put the parties in their original positions, the contract cannot be rescinded: *Sheffield Nickel Co. v. Unwin* (1877), 2 Q.B.D. 214; the defendants cannot return the goods, and they must pay the price: *Clarke v. Dickson* (1858), E.B. & E. 148; *Sully v. Frean* (1854), 10 Ex. 535.

And it is not contended that the goods were practically useless: *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394; *Adam v. Newbigging* (1888), 13 App. Cas. 308.

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The defendants do not in their pleadings set up these two contentions; but they claim damages for fraud by way of counter-claim.

No doubt, damages for deceit may be claimed although the contract is not and cannot be rescinded: *S. Pearson & Son Limited v. Dublin Corporation*, [1907] A.C. 351; *Webb v. Roberts* (1908), 16 O.L.R. 279.

As has been said, fraud has not been found, and we cannot find it on this evidence.

In the days of strict practice—still called by some (and not ironically) the “good old days” of practice—if a plaintiff chose to base his claim on fraud and failed to prove it, he had to take the consequences, his action was dismissed with costs: *Thom v. Bigland* (1853), 8 Ex. 725; but in these days of more elastic practice we determine the facts (if so requested), and, if necessary and if so requested, mould the pleadings to suit the facts, and give judgment accordingly.

The substantive law, however, has not been changed—the varying permutations of adjective law have not affected the great principles of substantive law.

In *Thom v. Bigland*, 8 Ex. 725, at p. 731, Parke, B., one of the greatest masters of the English law who have adorned the Bench, says: “It is settled law that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, or” (this is explained as meaning “and” in 9 Ex. 426, note) “makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position to his damage.”

The latest case in our Courts seems to be that of *Grant Campbell & Co. v. Devon Lumber Co. Limited*, 7 O.W.N. 209, reversing S.C. (1914), 6 O.W.N. 673. There it was proved that a misrepresentation was made of the number of trees to be cut, but fraud was not established. The Divisional Court held that no case was made for reformation of the contract, and that, in the absence of fraud, the plaintiffs could succeed only if they were “entitled to repudiate the contract,” etc. The Court found that by reason of their conduct they were not entitled to repudiate the contract, and accordingly dismissed the action.

In the present case there is no pretence that the contract can



be reformed—there is no doubt that the goods intended to be bought and sold were “all the junk on lots Nos. 16 and 17,” etc. The price was to be \$1,500, the other provisions are properly expressed in the document, and the contract cannot be repudiated.

It is, however, argued by Mr. Elliott that, as this is a case of a sale of goods, the plaintiff is liable as upon a warranty—the liability upon a warranty is of course irrespective of fraud. “Warranty in a sale of personal property is a statement or representation made by the seller, contemporaneously with and as a part of the contract of sale, though collateral to the express object of it, having reference to the character or quality of, or the title to, the goods or article sold, and by which the seller promises or undertakes that certain facts are, or shall be, as he represents them:” 30 Am. & Eng. Encyc. of Law, 2nd ed., p. 129. But, although the warranty is generally of the quality or title, apparently there is no reason why there should not be a warranty as to quantity. “If there were a warranty as to quantity on the part of the sellers, and if there were a breach of that warranty, the defendant is entitled to damages:” *per* Meredith, C.J.C.P., in *London Electric Co. v. Eckert* (1917), 40 O.L.R. 208, at p. 219. In that view, the evidence should be carefully examined to see if there really was “a warranty as to quantity.”

The plaintiff says that the defendants came to him and wished to rent his store:—

“They asked me if I would rent the place; I says, ‘I can’t rent it with all this stock on hand, if I could sell the stock out then I might talk about renting it.’ They asked me what I would take for the stock; I says, ‘I will take’—in an offhanded way I says, ‘I will take \$3,000 just as it was;’ they went around and went around the heaps of iron outside and went through the barn and up and down through it and finally they made me an offer of \$1,500. The stock was laying different places, and they came back and offered me \$1,500; they then asked me what I would take for the rent of the place; I says, ‘\$30 a month.’

“Q. That is, they proposed to buy your stock and rent the place? A. Yes, sir. Then they offered me \$15; I says, ‘No, I wont take no \$15;’ I says, ‘You can’t have it for no \$15 a month.’ There were a few words passed.

“Q. What was eventually done? They offered me the \$1,500

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for the stock, and I told them they couldn't have the place less than \$20 a month anyway, but I would consider the stock at \$1,500.

"Q. What do you mean by you would consider? A. I meant I would not give them an answer.

"Q. You wanted to think it over? A. Yes, and I wanted to have a talk with my son, for he had money locked up in the stock.

"Q. You did come to a conclusion about it? A. Yes, sir.

"Q. Tell us what was done—as the result of the conversation with your son, what did you do? A. The next week I told them they could have the stock for \$1,500.

"Q. And what about the place? A. It was to be \$20 a month.

"Q. After that what was done? A. Well, on August 1st or 2nd we came down here to Mr. Carnew, and he drew up the writings, the agreement.

"Q. You came down to Mr. Carnew, and were the writings drawn as quickly as you came down? A. Yes, they were drawn up that day.

"Q. Who gave Mr. Carnew instructions to draw them? A. I did.

"Q. Were the other gentlemen there? A. Yes, sir.

"Q. And the agreement you say was drawn? A. Yes, sir.

"Q. What did you say to them in reference to the value of the iron and stock that was there? A. I didn't say anything and they didn't ask me anything.

"Q. What do you mean? A. They didn't ask me what was there: I only went by what money I had invested in the stock.

"Q. How did they get at the value? A. They just walked around it and looked at it and made me that offer.

"Q. They went down and sized it up themselves? A. Yes, sir.

"Q. And they offered you \$1,500? A. Yes, sir.

"Q. And you have not been paid the balance of that \$1,500? A. No, sir.

"Q. You were to get \$1,500 for the stock? A. Yes, sir.

"Q. And you were to get \$240 a year for the premises? A. Yes, sir.

"Q. How much did you have there? A. As nearly as I could

tell I had \$1,500 locked up in that stock, me and my boy together.

"Q. Your judgment of quantity must be poor too for you to think there was \$1,500 worth of stuff there; what do you say to that? A. I claim if the stuff had been handled as it should have been handled there was between \$1,800 and \$2,000 worth of stuff.

"Q. In fact you told them there was \$2,000 worth? A. I told them it ought to fetch \$2,000 at any kind of price, and if I had had it this spring I could have made \$3,000 out of it.

"Q. How did you come to tell them there was \$2,000 worth? A. That was long after the bargain was made.

"Q. Was it before the agreement was drawn? A. After the agreement was drawn.

"Q. How did you come to tell them that? A. I was passing through the yard one day, and they were shipping and loading, and I says, 'There is a fine lot of iron there,' and they says, 'Yes,' and I says, 'There ought to be between \$1,800 and \$2,000 worth of stock there.' "

Mr. Carnew, the solicitor who drew the agreement, says:—

"Q. Was anything said between the parties as to the quantity of stuff they were buying? A. Yes, I think Mr. Gardner said at the time that they were perfectly safe in estimating the amount of junk and stock he had on hand as being a greater amount than \$1,500, but it was not a surety in any way; in my opinion, it was an estimate that Gardner had given of property that these men had all seen and had an opportunity of looking over."

The defendant Merker says:—

"Q. Just tell what took place? A. We came in and we told him we heard he wanted to rent the place, and we would like to see if it was possible for us to rent it from him. The first thing he says, 'You can't get that place unless you get the stock with it; I says, 'How is that?' He says, 'I can't let the place go until I dispose of the stock;' so I told him we are not wholesale buyers, we are peddlers. Well, he says, he was an old man and he couldn't get along with that business, and his children wanted to get out of the business, and he would try and give us the stock to handle it, and then we would be able to get the place.

"Q. Did you look at the stock? A. Yes.

"Q. Was he with you? A. Yes, he went around and shewed

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us the stock. I says, 'What you think?' He says, 'I think there is \$2,000 worth in that stock;' I says, 'We can't buy that stock because we have no money;' he says, 'Money would be no question, the only thing if you take and handle the stock you will make enough for your work;' I told him, 'If you think there is \$2,000 worth of stock the only thing we can give you is \$1,500;' that would leave \$500 for our work and expenses."

A week or so afterwards:—

"We started to talk over the matter again; the first thing I told him before anything; 'Mr. Gardner, we are poor men, we are trying to make a living for our family, and if you think there is not enough stuff to cover the money, we will not go into business together.' He said he was perfectly satisfied it would pay us to handle the stock.

"Q. And pay him the \$1,500? A. Yes.

"Q. Was that talked of again? A. Yes; he said the children wanted to give up the business, and he decided he would let us have the stock."

Later on:—

"Me and Presternat came there, and Mr. Gardner was waiting for us, so we walked to the station and I told Mr. Gardner, I says: 'Before we make any expenses I want to consider, before it piled the stuff there, I don't know what is lying on the bottom, there may be iron on top and stone on the bottom, you know most, and if you think it would not pay for us, there is no use to make expenses.' He says, 'I am perfectly satisfied you will make a big \$500 for your work and expenses.' That is the conversations had between the Gilbert House and the C.N.R. station.

"Q. He was satisfied you would make \$500 over and above? A. Yes."

Speaking of the first interview, Merker says:—

"Q. Talk about the price? A. I asked him about selling; he says, 'There is \$2,000 worth of stock there.' I told him if he thinks there is that much we will take it for \$1,500.

"Q. How did you arrive at the \$1,500? A. That was the same day.

"Q. How did you arrive at the price? A. He said there was over \$2,000 worth of stock, he told us he would give us a show to make a few dollars to handle the stock, to make over our

expenses a few dollars: I told him if we could handle the stock, if there is that much stock in it as he says, we will give him \$1,500 and \$500 for ourselves and our expenses."

Presternat, the other defendant, examined *de bene'esse*, says that on examination he and Merker estimated the junk at 150 tons, but the plaintiff says it was more than that, that he just wanted to get value of it, and "he said distinctly there is \$2,000 positive sure at the price it is now . . . \$2,000 worth of stock . . . he was sure of \$2,000." When they came back the second day "the whole three of us . . . we told him we don't know what it is worth . . . 'If you are sure you have \$2,000 worth of stuff we will give you \$1,500 . . . so long as it comes to \$1,500 you will receive the money and after that the balance we will take' . . . He said, 'That is fair enough.' Later on he said, 'You sure as anything will have \$500 profit, that means \$1,500 and \$500 profit.' "

Called in reply, the plaintiff says:—

"Q. You are still under oath, Mr. Gardner? A. Yes, sir.

"Q. You heard the statement of the defendant Merker and the evidence of Mr. Presternat that you stated positively without any qualifications that there was \$2,000 worth of stuff there, what do you say? A. I said nothing of the kind; I said, 'I am satisfied in my own mind there is between \$1,800 and \$2,000 worth of stock there if it handled right,' and I am satisfied yet . . .

"Q. The questions of \$1,500 and \$2,000 were mentioned by you when Mr. Carnew was drawing the agreement? A. I say so still.

"Q. What were they mentioned for? A. For the stock that was on hand.

"Q. What do you mean by \$2,000 when you mentioned it, what was your object in mentioning \$2,000? A. I claim they were getting that value.

"Q. They were getting \$2,000 worth of iron? A. Between \$1,800 and \$2,000.

"Q. And the difference between the \$1,500 would give them a margin for their work? A. Certainly.

"Q. Did you have any ground upon which you based that? A. All the ground I had was the amount of money I had expended and put into the stock.

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"Q. Did you tell them that is the money you had put into it?  
A. I don't know as I did.

"Q. Did you tell them how you arrived at that quantity? A.  
No; they didn't ask me; I asked them \$3,000 for the stock, and  
they went around and looked around more than once, went  
around the pile and looked at it, and they came back and offered  
me \$1,500; I said I would consider it.

"Q. At that time you know you didn't have \$3,000 worth?  
A. If I had had all my stock on hand this spring, I would have  
made \$3,000.

"Q. We won't bother with that; you knew then you didn't  
have \$3,000 worth at the market price? A. Not at the price  
it was then; I told them I supposed there were between \$1,800  
and \$2,000.

"Q. You told me that a few moments ago? A. I said I  
believed there was between \$1,800 and \$2,000 there, and I believe  
so still.

"Q. You didn't put in the word 'believe' in the first place at  
all, you are mistaken, you didn't say to them in this way, 'There  
is a quantity of iron, I believe I had \$2,000 worth, that is the  
amount of money I put into it and you will have \$500 over and  
above the \$1,500 for your work;' you didn't say it to them like  
that? A. Yes.

"Q. Just these words? A. Yes, that is the way I put it."

The evidence seems very loose and unsatisfactory; we have not  
the witnesses before us, and we must do the best we can with  
the material such as it is.

The learned County Court Judge finds that the defendants  
"merely wished to be certain that they would come out even on  
the junk in order that they might have the place. And further  
than that I am satisfied that they relied almost entirely, if not  
entirely, upon the plaintiff's statement that there was \$1,500  
to \$2,000 of value in the junk. They say they figured it out in their  
own minds that if they gave \$1,500 for it it would cost \$500 perhaps  
to handle it, and in that way they would come out even. That,  
according to their evidence, was all they were figuring on, and  
there is nothing to contradict that view-point, and that is why I  
am impressed with the fact that they were not speculating on  
making a profit but merely figuring to come out even, and there  
is nothing in the evidence of the plaintiff differing from that."



It is not enough that the buyers relied "almost entirely" or indeed "entirely" upon the seller's statement to make the statement a warranty. Lord Abinger's criterion has never been bettered: "An express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it:" *Chanter v. Hopkins* (1838), 4 M. & W. 399, 404; *cf. Stuckey v. Bailey* (1862), 3 F. & F. 1. A mere expression of opinion or belief, where the matter is necessarily one of opinion and belief, is not a warranty, however emphatic; but an affirmation made at the time of sale is a warranty, provided it appears that it was intended as such: *Pasley v. Freeman* (1789), 3 T.R. 51; *Richardson v. Brown* (1823), 1 Bing. 344. It may fairly be said that an affirmation is a warranty if the seller assume to assert a fact of which the buyer is ignorant and does not merely express an opinion.

The trial Judge accepts the plaintiff's account of the statements made—the plaintiff alone speaks of \$1,800 or \$2,000, and what the plaintiff says is, "I said I believed there was between \$1,800 and \$2,000 there." Where the property is before the buyer at the time of sale and open to his inspection, there is no presumption that there is an intention on the part of the buyer to warrant, and the intention to warrant must be shewn: 30 Am. & Eng. Encyc. of Law, 2nd ed., p. 140.

I do not think this expression of belief can be considered a warranty—and, while the defendants may have relied upon it, it gives no cause of action.

The learned County Court Judge pursued a course which was clearly wrong—he says:—

"I think I shall do something in this case which I have never done before; I will give a judgment perhaps not judicial in the sense of reaching a conclusion as to the point of law, but which I think is equitable on the facts, and which is as nearly fair between the parties as I could reason it out—in other words, just such a judgment as a jury might give. We will leave it open then to either side, if they think wise, to have the matter again investigated by the Court of Appeal, who might think it wise to consider it more strictly from a purely legal standpoint; but perhaps that point is so open on either side—there may be sufficient doubt as

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to what the Court would do—that the parties might see fit to accept the judgment.

“I think I shall discharge my duty and satisfy my conscience to the plaintiff by giving judgment for \$200 with costs.”

No Judge has the right to give a “judgment not judicial:” it is not the duty of a Judge to do justice according to some supposed rule “equitable on the facts.” We have got far beyond the practice of measuring by the length of the Chancellor’s foot. The Courts are not established or sustained to do retributive justice, but justice according to the law; and no Judge has any more right to substitute his views for this than Cyrus in the old story to take away from the small boy his large cloak and give it to the larger. The Judge must find the facts and apply the law to the facts so found, and nothing else or less should satisfy the judicial conscience, as nothing else or less will be discharging the Judge’s duty.

If there were found to be a warranty of quantity and a breach, the defendants, according to the law of England, would be entitled to set off the difference in value in diminution of the purchase-price: *Allen v. Cameron* (1833), 1 C. & M. 832; *Cousins v. Paddon* (1835), 2 C.M. & R. 547; or even in extinction thereof: *Basten v. Butter* (1806), 7 East 479; *Poulton v. Lattimore* (1829), 9 B. & C. 259.

In our Province they would be entitled to a judgment against the plaintiff for the excess of their damages over the balance of the purchase-price, even without a counterclaim: *Smart v. Bowmanville Machine and Implement Co.* (1875), 25 U.C.C.P. 503; *Parsons v. Crabb* (1871), 31 U.C.R. 434; *Sinclair v. Town Council of Galt* (1859), 17 U.C.R. 259.

The judgment, if no warranty was found, should be for the plaintiff for the amount sued for; but here there is no cross-appeal to increase the amount; and, finding, as I do, that there was no warranty, the judgment should be to dismiss the appeal with costs.

The judgment of the County Court could be right only if a warranty were found and a breach resulting in damages \$200 less than the balance of the purchase-money.

SUTHERLAND, J., agreed in the result.

KELLY, J.:—This is not a case where the goods were sold solely by description or by sample, but after what appears from the evidence to have been a careful personal inspection by the purchasers, a circumstance which is not without weight in determining whether there was either a misrepresentation or a warranty.

As the evidence presents itself to me, there has not been established misrepresentation such as would entitle the defendants to resist payment of the unpaid part of the purchase-money, or a warranty for the breach of which they could claim damages. The plaintiff's reference to the value of the goods sold did not amount to more than an expression of his opinion or of an honest belief that the value was from \$1,800 to \$2,000. Nor can the statement be said, on the evidence, to have been made with the intention of warranting it as a fact. That interpretation of the evidence seems to me reasonable, and it is not inconsistent but rather in accord with the conclusions of the trial Judge, expressed though they appear to have been with some hesitation.

If the opinion I entertain, both as to misrepresentation and warranty, is correct, the plaintiff was entitled to succeed for the unpaid portion of the purchase-money, and the defendants' counterclaim consequently failed. The trial Judge, however, awarded the plaintiff, not the full unpaid balance, but \$200, and the plaintiff has accepted his ruling in that he has not appealed.

The trial judgment should therefore not be disturbed, and the respondent should have the costs of this appeal.

*Appeal dismissed with costs.*

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[FALCONBRIDGE, C.J.K.B.]

July 31.

SCOTT v. CRINNIAN.

*Vendor and Purchaser—Agreement for Sale of Land—Purchase-money Payable in Instalments—Destruction by Fire of Buildings on Land—Application of Insurance Money—Instalments not yet Due—Vendor's Lien—"Mortgage"—Mortgages Act, R.S.O. 1914, ch. 112, secs. 2 (d), 6—Security for Future Instalments—Payment into Court.*

The plaintiffs agreed to sell, to the assignors of the defendant, land upon which there were buildings. The purchase-money was payable by instalments; and a large part of it was still unpaid when the buildings were damaged by fire. The agreement contained a covenant that the purchasers would insure the buildings in their own names, with loss payable to the vendors as their interest might appear. The defendant insured the building accordingly, and the insurance companies issued cheques for the amount of the loss, payable to the order of the defendant and the plaintiffs:—

*Held*, that the plaintiffs, having a vendor's lien, were mortgagees within the meaning of sec. 2 (d) of the Mortgages Act, R.S.O. 1914, ch. 112, and were entitled to have the insurance money applied in accordance with the provisions of sec. 6.

If the plaintiffs were not mortgagees, the same application of the moneys should be made, by virtue of the relationship of vendor and purchaser.

The plaintiffs were entitled to the security of the insurance money, just as, before the fire, they were entitled to the security of the building which the money represented.

The plaintiffs were not entitled to apply the insurance money in payment of instalments not yet due, but only to look to that money as part of their security.

The period during which instalments were to be paid being a long one, the money should not be held in trust and invested; but, if the parties could not agree as to its disposal, should be paid into Court.

*Corham v. Kingston* (1889), 17 O.R. 432, and *Edmonds v. Hamilton Provident and Loan Society* (1881), 18 A.R. 347, followed.

ACTION by the vendors of an hotel property, against the assignee of the purchasers, for a declaration of the plaintiffs' right to receive the sum of \$15,000, payable by insurance companies in respect of a loss by a fire which damaged the hotel, and to compel the defendant to execute a release or to endorse, in favour of the plaintiffs, cheques drawn by the insurance companies payable to the order of the defendant and the plaintiffs.

The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at London:

Sir George Gibbons, K.C., for the plaintiffs.

T. G. Meredith, K.C., for the defendant.

July 31. FALCONBRIDGE, C.J.K.B.:—By an agreement of sale made between the plaintiffs and T. H. Crinnian and P. C. McGowan,

dated the 14th day of May, 1912, the plaintiffs agreed to sell certain premises, in the town of Sarnia, to the said Crinnian and McGowan. On the said premises was erected a building used as an hotel, known as the Belchamber House.

The price of the property was \$21,000, to be paid as follows: \$1,000 on the date of the signing of the agreement and the sum of \$300 payable on the 7th day of March in each and every year thereafter until the purchase-price is paid, with interest at 5 per cent. payable yearly on the balance of the purchase-money remaining due and unpaid from time to time, with the privilege to the purchasers of increasing the said sum of \$300 up to any amount. It will thus be seen that the purchasers are entitled to more than 60 years before completing full payment.

By a clause in the said agreement it was provided: "The purchasers covenant with the vendors to insure and to keep insured the said Belchamber House to its full insurable value, the said insurance to be made out in the name of the purchasers with the loss, thereunder, if any, payable to the vendors as their interest in the said property may appear, and in the event of the purchasers not insuring the said premises as in this paragraph required the vendors shall have the liberty and right to insure said premises to their full insurable value in the manner in this paragraph set out and to charge the premium therefor to the purchasers and add it to the purchase-price of said premises."

The said T. H. Crinnian and P. C. McGowan subsequently transferred their interest in the said agreement to the said defendant, the wife of the said T. H. Crinnian, and the defendant, in pursuance of the said agreement, insured the buildings upon the said premises in various companies.

The said premises were damaged by fire, and the loss was apportioned among 9 insurance companies, and the said companies issued cheques, to the amount of about \$15,000, payable to the order of the defendant and the plaintiffs, for their respective amounts.

The plaintiffs now seek an order directing the defendant to execute such release as may be necessary to secure the delivery of the said cheques to the plaintiffs, and that she be ordered to endorse the same so that the plaintiffs may obtain the said proceeds and apply and hold the same in accordance with their legal obligation under the terms of the said agreement.

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The defendant, alleging that all past-due instalments of the said purchase-money have been paid, but that the portion of the purchase-money which is not yet due is greater than the total amount of the insurance moneys, claims that the insurance moneys are the property of the defendant, subject only to a lien in favour of the plaintiffs, and to the right of the plaintiffs, so often as there shall be arrears of principal or interest payable to the plaintiffs by virtue of the said agreement, to apply so much of the said insurance moneys as may be necessary in payment of the said arrears, and the defendant claims a declaration in such terms.

At the trial various assignments were filed as exhibits, and from these it appeared that the record required to be amended by the addition of various persons now entitled under the original vendors.

I reserved judgment for the purpose of allowing the necessary amendment to be made, as well as pending a suggested settlement. I am now informed that all the parties entitled are before the Court, and I therefore proceed to give judgment.

By sec. 6 of the Mortgages Act, R.S.O. 1914, ch. 112, it is provided:—

“(1) All money payable to a mortgagor on an insurance of the mortgaged property, including effects, whether affixed to the freehold or not, being or forming part thereof, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

“(2) Without prejudice to any obligation to the contrary imposed by law or by special contract a mortgagee may require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage.”

By sec. 2, clause (d), of the same Act, “‘Mortgage’ shall include any charge on any property for securing money or money’s worth; ‘mortgage money’ shall mean money or money’s worth secured by a mortgage; ‘mortgagor’ shall include any person deriving title under the original mortgagor or entitled to redeem a mortgage, according to his estate, interest or right in the mortgaged property; and ‘mortgagee’ shall include any person deriving title under the original mortgagee.”

This definition of “mortgage” is wide enough to cover the charge commonly known as a vendor’s lien, and I am inclined to



think that the plaintiffs are mortgagees within the meaning of sec. 2, and therefore within that of sec. 6, though I doubt whether the Legislature ever considered very seriously the effect of applying this wide definition to every individual provision of the Mortgage Act.

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The statute was much discussed in *Edmonds v. Hamilton Provident and Loan Society* (1891), 18 A.R. 347. The present case is to some extent the converse of the *Edmonds* case. There the debtor desired that the insurance money should be applied on the debt, and the creditor objected. Here the creditors desire to have the insurance moneys applied on the debt, and the debtor objects.

It was decided in the *Edmonds* case that the mortgagee is not obliged to apply the money on overdue instalments, although he may do so. It was not necessary in that case to decide whether he would have been entitled to apply it on instalments not yet due; but in *Corham v. Kingston* (1889), 17 O.R. 432, it had been decided that a mortgagee is not entitled to accelerate payments, and on this point the judgment in *Corham v. Kingston* is not affected by the *Edmonds* case.

There is, therefore, nothing in the judgments of *Corham v. Kingston* or in the *Edmonds* case to justify the plaintiffs' contention that they are entitled to apply the insurance moneys in payment of instalments not yet due; but it appears from those cases that, if the plaintiffs are mortgagees, they are entitled to the security of the insurance money, just as, before the fire, they were entitled to the security of the buildings which the money represents.

Even if I am wrong in thinking that the plaintiffs are mortgagees within the statute, it seems to me that the same principles would apply as between vendor and purchaser. The plaintiffs, in my opinion, are not entitled to apply the insurance money in payment of instalments not yet due, but they are entitled to look to the insurance money as part of their security. I do not see how I can direct the moneys to be held in trust and invested for so long a period; and, if the parties cannot agree as to its disposal, I will direct that the moneys be paid into Court.

The parties are fairly seeking the direction of the Court in the ascertainment of their rights, neither of them succeeds completely, and I do not think I ought to penalise either of them with costs. There will therefore be no order as to costs.

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Aug. 7.

[MEREDITH, C.J.C.P.]

## RAYMOND V. TOWNSHIP OF BOSANQUET.

*Highway—Nonrepair—Accident to Motor-vehicle—Injury to Passenger—Dangerous Approach to Narrow Bridge—Nonfeasance and Misfeasance of Township Municipality—Duty under sec. 460 of Municipal Act, R.S.O. 1914, ch. 192—Needs of Traffic—Proximate Cause of Accident—Contributory Negligence of Driver—Passenger not Responsible for—Extent of Injury—Assessment of Damages.*

A highway may be out of repair, within the meaning of sec. 460 of the Municipal Act, although there is no disrepair in the sense of dilapidation: the statute requires that the highway be kept in a condition reasonably sufficient for the needs of the traffic over it, where the municipal corporation have a margin of taxation power more than enough for the purpose.

*Ackersviller v. County of Perth* (1914), 32 O.L.R. 423, 428, followed.

For their own purposes, the defendants, a township municipality, diverted the travelled road from the right hand side, going north, of the original allowance for road, across a municipal ditch to the left hand side, on which they acquired a strip of land, along the original allowance, sufficient for a road on that side of the ditch until a change of course of the ditch permitted a return to the original allowance. A bridge over the ditch was necessary to permit of this "cross-over," and the defendants, instead of building a new bridge, made the cross-over by means of a bridge which, years before, they had made for the use of a single farm-owner, in order to give him access to the road as it then was. The effect was, that the turn which must be made, going north, at the bridge, was too sharp, having regard especially to the narrowness of the bridge, and that the bridge was too narrow. It was at this place that an accident happened to a motor-car in which the plaintiff was a passenger, by reason of which he was injured:—

*Held*, that the defendants were guilty of neglect of the duty imposed upon them by statute, to keep the highway in repair at the place where the accident happened.

*Semble*, that there was also misfeasance on the part of the defendants.

*Webb v. Barton Stoney Creek Consolidated Road Co.* (1895), 26 O.R. 343, referred to.

Municipalities with low assessments and low taxation should not be encouraged in any such notion as that such a bridge as above described was enough for the needs of traffic—that such a highway was kept in repair by such a structure.

*Held*, also, that the want of repair of the road, and not the negligence of the driver of the car, was the proximate cause of the accident.

If there had been contributory negligence on the part of the driver, the plaintiff would not have been responsible for it: the driver was not the servant or agent of the plaintiff or subject to his orders or control, and there was no evidence that the plaintiff had anything to do or say regarding the manner in which the approach to the bridge was made.

Discussion as to the extent of the plaintiff's injuries.

Damages assessed at \$1,750.

ACTION to recover damages for bodily injuries sustained by the plaintiff in a highway accident. The plaintiff alleged that, by reason of the neglect of the defendants, the Municipal Corporation of the Township of Bosanquet, the highway was out of repair.

April 29 and 30. The action was tried by MEREDITH, C.J.C.P., without a jury, at Sarnia.

*J. M. McEvoy*, for the plaintiff.

*A. Weir*, for the defendants.

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August 7. MEREDITH, C.J.C.P.:—This action, begun on the 27th day of August last, is brought to recover damages for bodily injuries sustained by the plaintiff, in a highway accident, on the 26th day of July, 1917. The amount claimed in the statement of claim, delivered on the 29th day of September last, was \$2,000; but the plaintiff asked leave at the trial to change the amount of his claim to \$20,000; alleging that his injuries, so sustained, are very much greater than they were thought to be when the statement of claim was delivered. Leave so to amend is now given; the application for such leave was not seriously opposed; but no order was made before the trial began, as it seemed to me to be the better course to wait until the character of the case was disclosed before disposing of the application.

The claim of the plaintiff is grounded mainly upon the duty imposed by statute upon the defendants to keep the highway on which the accident happened in repair: The Municipal Act, sec. 460\*; the defendants admit the duty, but deny any breach of it: and it is unquestionable that there was no disrepair, in the sense in which that word is ordinarily used—dilapidation; though there may have been a failure to perform the statute-imposed duty, which is wide enough to require that the highway be kept in a condition reasonably sufficient for the needs of the traffic over it; the defendants having a margin of taxation power more than enough for the purpose: see *Ackersviller v. County of Perth* (1914), 32 O.L.R. 423, at p. 428. But, in addition to that bare duty to keep the road in repair, the plaintiff's grounds may be amplified by the fact that that which is complained of is not mere nonfeasance: the case has a misfeasance aspect: see *Webb v. Barton Stoney Creek Consolidated Road Co.* (1895), 26 O.R. 343. For their own purposes the defendants diverted the travelled road from the right hand side, going north, of the original allowance for road, across a municipal

\*R.S.O. 1914, ch. 192, sec. 460.—(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default.



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ditch, to the left hand side, on which they acquired a strip of land, along the original allowance for road, sufficient for a road on that side of the ditch until a change of course of the ditch permitted a return to the original allowance for road. A bridge over the ditch was necessary to permit of this "cross-over:" and it is the character of that cross-over, which the defendants compelled the traffic to make, that the plaintiff finds fault with: his contention is, that the turn which must be made, going north, at the bridge, is too sharp, having regard especially to the narrowness of the bridge, and that the bridge is altogether too narrow; that, instead of keeping the road in repair, the defendants have needlessly made it dangerous, really creating a public nuisance. The road, until quite modern days, as I have said, ran along the right hand side of the original allowance; the cross-over seems to have been made because the waters of the ditch, on the other side of it, were "eating into" the road on the right hand side, and, having regard to the cost of meeting that difficulty, the defendants deemed it better to cross-over; and, if they had then built a bridge for that purpose, it probably would have been a much wider one than that in question, and perhaps would have been built upon an obtuse angle, and if so the question under discussion should not have arisen, and, according to the plaintiff's contention, no accident could have happened. Instead of building a new bridge, the defendants, for the purposes of economy, made the cross-over by means of a bridge which, years before, they had made for the use of a single farm-owner, in order to give him access to the road, which was then on the other side of the ditch. This is unquestionably a strong point against the defendants: it is very improbable that they would build, for one land-owner only, a bridge sufficient for the whole traffic over the road. A narrow bridge might be ample for the one land-owner; want of room for teams to pass one another on the bridge could hardly be an objection to such a bridge: it is a very serious objection, and obstruction to traffic, when made part of a much travelled highway. The sharpness of the turn, at a right angle, might afford no great inconvenience to the land-owner for whose benefit only the way into his farm was made: he would be familiar with it, and in those days—when it was built—there was little thought that so many farmers should be so soon driving motor-cars: it would be very different as part of the highway which had to be traversed by many who never

saw it before; and that difference is greatly added to by the present-day frequent traffic of motor-cars upon that road.

Then it is made plain by the defendants' recent conduct, respecting the bridge, that they considered it insufficient. When the accident happened, they were about to widen it, and had building material for that purpose on the ground.

A good deal of testimony was given, in the defendants' behalf, as to the ease with which motor-cars might be, and were, driven over the bridge, testimony to which I must refer more fully upon another question, and in regard to which it is enough to say now that it was quite insufficient to counterbalance the testimony to the contrary, the admitted facts as to the width of the bridge, the nature of the approach to it, and the defendants' intention immediately to widen it, combined.

I had no difficulty in reaching the conclusion, at the trial, that the defendants had been guilty of neglect of the duty imposed upon them by statute, to keep in repair the highway in question at the place where the accident happened; any question whether the case is one of misfeasance also, is not essential. Subsequent consideration of the case has not altered my first impressions in these respects.

At the trial I expressed the opinion, and now repeat it, that municipal councils, in municipalities with low assessments and low taxation, should not be encouraged in any such notion as that such a bridge as that in question is enough for the needs of traffic such as day and night passed over the highway in question at the place in question: that such a highway is kept in repair by such a structure.

The next question is: Was the want of repair of the road, or was the negligence of the driver of the car in which the plaintiff was when injured, the proximate cause of the accident?

It was proved that the party, of which the plaintiff was one, and which filled several cars, had been proceeding at an unlawful and somewhat reckless rate of speed not long before the accident happened; but there is no direct evidence that the car in question was being driven in an improper manner in regard to speed at or for some time before the accident; whilst the driver of the car, and the other persons who were in it, testified that in all respects the car was brought to the bridge at a very moderate rate of speed, and

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with due care in all respects. The testimony of the witness Mr. Flock especially, who is the plaintiff's solicitor in this action, seemed to me to be given with much candour, and to be worthy of credit, in this respect.

The circumstance that only one, if indeed any, other accident, due to the width and position of the bridge, was proved, is a strong point in the defendants' favour: so too is the fact that, according to their testimony, a great many drivers of motor-cars met with no difficulty in crossing the bridge; and, besides these things, there is the testimony of the several witnesses as to marks on the bridge and in the road indicating to their minds that no reasonable effort to cross the bridge was being made when the accident happened, either because the car was going too fast to be properly turned or because the driver of it was proceeding with great carelessness: but, on the other hand, there is the testimony of other witnesses as to the insufficiency in width of the bridge, the difficulty in crossing it, and the need to stop and "back up" when attempting to do so, and the danger to traffic which it caused: one of these witnesses—Mr. Coleridge—impressed me with the feeling that much dependence might be placed upon all that he said. There are always with us those drivers who like to boast of the nearness they can go safely to danger; and who have much confidence in their ability to "loop the loop" or dash "through the air with the greatest of ease;" but such witnesses are not as helpful in a case such as this as perhaps even are those who deem "discretion the better part," and generally desire to find a way of keeping as far as possible from danger rather than having any desire to prove how near they can go to it without injury. And there is always, or generally, more or less doubt whether the foundation for opinions is actual or mistaken, and whether the foundation really excludes any other reasonable conclusion, for circumstantial evidence should exclude as well as include. And against the opinion that excessive speed was the cause, there are the very strong, almost conclusive to my mind, facts that the car was not overturned, and was got out of the ditch without great difficulty, and, when out, was capable of being driven, as it was, with its own power alone.

Then no "danger" or "caution" post was put up until after the accident: such a warning could not take the place of proper repair of the road, but it might have prevented this accident: or have



much helped to prove that the accident was the result of the driver's negligence if it had nevertheless happened.

In all these circumstances, it is impossible for me to find, against the positive testimony of every one who knows, that reckless or careless driving, and not the character of the bridge, was the proximate cause of the accident.

Nor should the fact of the bridge-timbers in the highway be overlooked, whether they did or did not actually narrow the road. A driver unused to the road, there for the first time, as this driver was and others must be, cannot, as approaching, measure exactly whether the road is narrowed or not, and is necessarily placed in a more difficult position by reason of them; naturally and properly he desires to avoid running into them, and so the sweep around may be very reasonably lessened, though in fact the road may not be encroached upon actually by the timbers.

The defendants cannot succeed upon this ground.

Nor could they if only contributory negligence on the part of the driver were found, because the plaintiff would not have been responsible for such negligence. And because of that, and of the fact that an action by the driver against these defendants has been brought or given notice of, I abstain from speaking of the facts bearing upon this question, confining my observations to the question whether, if such negligence were proved and found, it would defeat this action. The driver was not the servant or agent of the plaintiff, or in any manner subject to his orders or control; and there is no evidence that the plaintiff had anything to do or say regarding the manner in which the approach to the bridge was made. So contributory negligence of the driver, if proved, could not defeat this action.

My conclusion is: that the defendants are liable in damages to the plaintiff for the injuries sustained by him in the highway accident which is the subject-matter of this action: and that conclusion was reached by me at the close of the trial, and unexpressed then only because of the difficulty which the question of damages presented.

The plaintiff should have reasonable damages, under all the circumstances of the case, for the injuries which he really sustained through the negligence of the defendants. The one difficulty, and to my mind, at the trial, a very formidable one, is not what are reasonable damages upon ascertained facts, but what injuries did

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the plaintiff really sustain? He could not tell. The capable physicians who testified at the trial, as witnesses called by him, could not tell; to their credit they recognised the uncertainty of prognosis in such a case. "It might be as bad as a case of cerebral concussion; or it might be functional only. He may recover but not beyond 75 per cent. A year after this litigation is over he will get well, or not at all. Will be a lot better in a year, I think."

In this unavoidable doubt it would be unjust to the defendants to give damages as if the case were one of organic spinal injury or other serious injury lasting as long as life lasted; and it would be hard upon the plaintiff if, on the onus of proof, he failed to get damages for such an injury, which afterwards, but too late to remedy the mistake, it should be made manifest he actually had sustained: there seemed to me, therefore, to be but one course to pursue, and that course has been pursued. A reasonable time has been allowed to elapse so that some of the nervousness occasioned by a pending trial might have passed; and so that any improvement or the reverse, in the man's condition, during that time, might afford grounds upon which future prospects might be better measured: and, after the elapse of that time, a capable physician and a capable surgeon were appointed to aid me in reaching a true conclusion as to the actual extent of the injuries. The surgeon, owing to military duties which must have precedence over all things in these days, was unable to act, and no other surgeon was appointed to take his place, because the physician was one of very many years' experience in both branches of his profession, and had been for many years head of the surgical department of the Faculty of Medicine of the Western University, and because his report, though disclosing no new features of a pronounced character in the case, enables me now to consider the question of damages with a reasonable degree of certainty that a right conclusion can be reached.

Dr. Waugh's report is quite in accord with what my findings would have been if I had been obliged to deal with the question of damages upon the evidence adduced at the trial only.

I assess the plaintiff's damages at.....	\$1,750
made up thus: for all pain and suffering.....	\$ 500
for loss in a business way for the first year.....	\$ 500
after that until recovery.....	\$ 500
and out of pocket payments.....	\$ 250

Considering that the man was well able most of the first year to oversee and take a large part in carrying on his business, I find that \$500, properly expended in having that done by another or others which he had before done but could not do because of his injuries, should quite make up for any pecuniary loss in this respect. Regard must always be had to the man's ability directly to oversee, and take part physically in, his business, ability gradually increasing until, I have no doubt, after hearing all the evidence and having had the advantage of seeing the man continually throughout the long trial of this case, in a year's more time, at the most, it shall be fully restored, substantially, except for the wear and tear of increasing years upon one approaching three score.

The evidence of out of pocket expenses was very indefinite; \$220 was said to be the sum due to one of the medical men; but, as he testified that he had seen the plaintiff professionally but twice, this sum probably includes his fee as a witness, which cannot be allowed as damages. On the evidence such as it is, I put the amount of damages in this respect, including small outgoings not entered up in books of account, and perhaps not remembered, at \$250, subject to the right, which I reserve to the plaintiff, to prove to me more accurately the actual amount; such amount, when ascertained by me, to be substituted for the \$250.

[An appeal by the defendants from the judgment of MEREDITH, C.J.C.P., was heard by the Second Divisional Court of the Appellate Division on the 28th November, 1918. Judgment was reserved.]

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BLANCHARD v. JACOBI.

*Duress—Action on Cheque Given in Order to Obtain Release from Custody—Arrest in Massachusetts of Resident of Ontario—Law of Massachusetts—Capias—Fraud—Defence to Action.*

There being a dispute between the defendant, doing business in Ontario, and a trading company in Boston, Massachusetts, as to the liability to pay for or to pay damages for the non-acceptance of certain machines which had been sent by the company to Ontario, the defendant wrote to the manager of the company stating that he (the defendant) would call on the company in Boston and endeavour to make an amicable settlement. This was at once assented to by the manager, who, as advised by the plaintiff, the company's attorney, intended to allow the defendant to come into Massachusetts at his own instance, and without being procured to come by the company, and that he should then be arrested under a capias for the claim asserted by the company. The defendant went to Boston, called on the manager, and found that no arrangement could be made. He was then arrested upon process obtained earlier in the day, upon an affidavit sworn by the manager, before any meeting had taken place. The defendant, failing to obtain bail, sent for the manager and offered to pay for the machines, and proceeded to draw a cheque upon a bank in Ontario for the amount, but the manager refused to accept the cheque. The plaintiff then intervened and offered to take the defendant's cheque and give his own cheque to the company for the amount, less his fee. The defendant gave his cheque, and was released. The plaintiff gave the defendant a receipt for the cheque, "which when paid will be in full settlement and discharge" of the claim of the company. The defendant stopped payment of his cheque. The plaintiff gave his cheque to the company, but it was not cashed by the company until after the dishonour of the defendant's cheque was known:—

*Held*, upon consideration of the law of Massachusetts, that the manager of the company acted fraudulently when he formed the plan to arrest, and, concealing this, permitted the defendant to walk into the net spread for him, and swore to all that was necessary to accomplish the arrest before he entered upon any discussion. The fraud was the procuring of the defendant's attornment to the jurisdiction of the Courts of Massachusetts; and the intent to secure arrest while arranging an interview to negotiate a settlement was the gist of the fraud.

*Stein v. Valkenhuysen* (1858), E.B. & F. 65, *Grainger v. Hill* (1838), 4 Bing. N.C. 212, and *Duke de Cadaval v. Collins* (1836), 4 A. & E. 858, followed.

*Held*, also, that the duress afforded the defendant an ample defence to the plaintiff's action upon the cheque.

ACTION upon a cheque drawn by the defendant upon a bank in Toronto, Ontario, and dishonoured.

September 17 and 18. The action was tried by MIDDLETON, J., at a Toronto sittings.

*Casey Wood*, for the plaintiff.

*A. C. McMaster and O. H. King*, for the defendant.

September 23. MIDDLETON, J.:—The action is upon a cheque made by the defendant in favour of the plaintiff, on the 17th

January, 1918, for \$3,075. Payment of this cheque was refused by the bank at the instance of the defendant, who asserted that it had been obtained by duress.

Emil T. Jacobi, the defendant, and his brother Fred T. Jacobi carry on business at Toronto under the name of their deceased father, Philip Jacobi. They are men of ample means and high commercial standing.

In the course of business they made a contract, dated the 13th June, 1916, with the Independent Button Fastener Machine Company of Boston, Mass., by which they became agents for the sale of its machines in Canada, and among other things agreed to sell 50 machines in the year which this agreement covered. The price to be paid was \$75 per machine if sold direct to a consumer and \$72.50 if sold to a jobber. Machines were to be sent by the company to itself at Toronto, and the defendant and his partner were to give room for storage in their warehouse in Toronto. Fifty machines were sent, nine were sold, and the remaining forty-one were in the warehouse, insured by the vendors as their own property.

The machines did not sell well, and, it is said, were of poor material and construction. For this reason the defendant and his partner refused to accept them or pay for them.

Correspondence followed, and Jacobi finally stated that he would call on the company in Boston and endeavour to arrange the matter amicably. This was at once assented to by Mr. Sneierson, the company's manager, who expressed great pleasure at the proposal, and stated that he would so arrange as to be present at any time Mr. Jacobi should arrange. In all this Mr. Sneierson was acting with guile and care, as his intention was that Jacobi should come into Massachusetts at his own instance, and without being procured to come by the company, and that he should then be arrested under a *capias* for the claim set up. This was the course advised by the attorney for the company, the present plaintiff.

On the 17th January, 1918, Jacobi arrived in Boston, and called on Sneierson. No arrangement could be made. Jacobi would not pay more than \$1,000, and Sneierson wanted over \$3,000. Both parties seem to have assumed that the price of the machines was the base of contention, and not damages for failure to accept. When settlement failed, Sneierson at once called in a sheriff's

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officer, and placed Jacobi under arrest, upon process obtained earlier in the day and before any meeting had taken place.

Jacobi remained in custody for some hours, seeking acquaintances who might become his sureties, but failed. He did not seek professional aid, or the result might have been different. When the sheriff's office was about to close at 6 p.m., Jacobi, fearing a night in custody, sent for Sneierson and capitulated. He offered to pay for the forty-one machines at \$75 each, \$3,075, and proceeded to draw his cheque for the amount. Sneierson then refused the cheque and demanded cash or an endorser. Jacobi could not give an endorser. As he said, he could as well give bail. At this juncture the plaintiff intervened, and, after discussion with his client in private, told Jacobi that he thought better of him than Sneierson and would accept his cheque for the \$3,075 and give his own cheque to the doubting client for that amount, less his collection fee. This satisfied the client, and Jacobi was grateful for his release, and at once gave his cheque—that now sued on.

After release Jacobi asked for a discharge of the company's claim, and the plaintiff, whose office was then closed, asked him to call in the morning, when he would give him a receipt.

Jacobi called and received a receipt for his cheque, "which when paid will be in full settlement and discharge" of the claim of the company. This receipt, in these terms, puts an end, I think, to the theory that the plaintiff was a good Samaritan who advanced this money to aid the stranger in the clutches of his hard-hearted client. Another fact of significance is that the cheque issued to Sneierson's company by the plaintiff, though dated the 18th January, was not cashed until the 23rd January, when the dishonour of Jacobi's cheque would be known.

The law of the Commonwealth of Massachusetts as to arrest is of importance. Experts gave evidence diametrically opposed, and counsel agreed that I should supplement this by my own reading of the statutes and the cases.

The statute-law is chapter 168 of the revised laws as amended; the more important amendments being one by which application is to be made to a Judge instead of a magistrate, and the amendment of 1916 relating to the circumstances under which an arrest may be made. Under the circumstances mentioned in sec. 1 as amended, a defendant may be arrested on mesne process.



The defendant may give a recognizance or may apply to reduce the *ad damnum* of the writ or may apply for his discharge, which is authorised "if the arrest is found to be unreasonable."

The recognizance is to surrender for examination; and, if he takes oath of his intention not to depart from the State, or the poor debtor's oath (i.e., that he has no assets worth more than \$20), if upon inquiry this oath is found to be true, or he surrenders all his property (beyond \$20) to his creditor, he may be discharged. Otherwise he remains in custody.

The arrest (under the Act of 1916) can only take place when five things are shewn:—

First, that one of the parties resides in the State.

Second, "a good cause of action and reasonable expectation of recovering" a sum exceeding \$20.

Third, that the plaintiff "believes and has reason to believe that the defendant intends to leave the Commonwealth so that execution if obtained cannot be served upon him."

Fourth, that he does not know of any property of the defendant within the Commonwealth, which can be reached by attachment or otherwise, sufficient to satisfy any judgment he may recover.

Fifth, that the defendant has property not exempt from being taken on execution which he does not intend to apply in payment of the plaintiff's claim.

Of all this the plaintiff must make affidavit and make proof to the satisfaction of the Justice to whom he may apply.

The first and fourth of these requirements were introduced in 1916. The others are found in the statutes for many years.

It is singular that there is little authority in decided cases as to the meaning of this statute. When the Act assumed its present form it was called "an Act to abolish imprisonment for debt and for the punishment of fraudulent debtors," and an examination of its provisions makes this purpose plain. Instead of the body of the debtor being liable to his creditors as a matter of course, as it once was in England and in Massachusetts and other countries where the law of England was adopted, imprisonment is not permitted unless the debtor is shewn to be fraudulent. As put by Morton, C.J., in *Cassier's Case* (1885), 139 Mass. 458, 459: "It is not the policy of the laws to imprison for debt; and . . . the arrest of a debtor is intended as a coercive measure, to compel him to apply his property to the payment of his debts."

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The right of any State to enact laws under which a person who is temporarily within its territory may be arrested to compel payment of a debt, cannot be denied. The presumption is against any intention on the part of a State to enact laws which in any way interfere with the liberty of those who do not owe it allegiance as citizens or who are not domiciled or ordinarily resident within its bounds. The only cases to which I was referred in Massachusetts which throw any light upon the question are founded upon old cases determined when arrest for debt was the normal method of asserting a civil right, and depend upon the doctrine that the obligations upon personal contracts follow the person, and may be asserted in any jurisdiction in which the person is found.

The statutes relating to arrest narrowing the common law right are thus made applicable to any one found in the territorial jurisdiction. Had the statute created a new right the result might have been different: *Barrell v. Benjamin* (1819), 15 Mass. 354; *Peabody v. Hamilton* (1870), 106 Mass. 217; *Paine v. Kelley* (1907), 197 Mass. 22.

I assume, therefore, that the defendant on his entering the State became subject to this law and liable to arrest, if by its terms his arrest was authorised.

It is plain from the statute and also from the decided cases that all the provisions constituting conditions precedent must exist.

Here I find that the second, third, and fifth were not existing.

The plaintiff (i.e., the company, plaintiff in the action in which the arrest was made) sued for the price of forty-one machines said to be delivered, \$3,075, and for certain wire amounting, less credits, to \$304.22, in all \$3,379.22. The machines had not been delivered, so the action should have been for damages, and the \$304.22 had been paid.

The cause of action sued for did not exist, and the claim, if any, was for a much smaller sum.

Then it was said that the defendant "intended to leave the Commonwealth so that execution if obtained cannot be served upon him." The defendant undoubtedly intended to leave the Commonwealth, and the result of leaving would prevent execution being served upon him. The plaintiff contends that this is enough. The defendant says that the words "so that" are equivalent to "with the intent that" and indicate the motive and purpose of the

leaving. Mr. Jacobi came into the Commonwealth for the purpose of making an amicable adjustment of the claim, and his intention at the time this affidavit was sworn was to adjust it and pay it, and he expected to do this before he left Boston. Nothing was further from his mind than any attempt to defeat or defraud the plaintiff or to evade any execution.

In the absence of any case shewing the statute to have another meaning, I accept the defendant's contention. If the plaintiff is right, the clause has no meaning, as any leaving of the State must prevent service of an execution.

I accept the plaintiff's view that the 5th clause applies to property anywhere, and is not confined to property within the Commonwealth. The fourth clause, speaking of property "within the Commonwealth," makes this plain. It must be shewn that the defendant does not intend to "apply this property to the payment of the plaintiff's claim." This could not be truthfully said when the defendant was, as already stated, in Boston for the sole purpose of adjusting and paying this claim. The affidavit was sworn before the parties met.

The case of *Paine v. Kelley*, 197 Mass. 22, determines that arrest under the statute is wrongful when the affidavit shewing he was "about to leave the Commonwealth" was untrue, because that implied that he was then within its bounds, and the train by which the defendant was travelling had not yet crossed the boundary when the affidavit was sworn; the only jurisdiction to arrest being when the statute was strictly complied with.

In the earlier case of *Sweet v. Kimball* (1896), 166 Mass. 332, it had been held that it was a fraud which vitiated the whole proceedings for the plaintiff to induce the defendant to come into the State to adjust a dispute with the intention of arresting him on his arrival. This principle is also affirmed in *Paine v. Kelley*, *supra*.

Such conduct is said to amount to duress such as to entitle the defendant to recover money paid, even though the Court had jurisdiction to issue the process. What is said by Mr. Justice Holmes (166 Mass. at p. 335) is clear: "We think that the count may be regarded as a count to recover money paid under duress . . . It is true that the . . . plaintiff could have got rid of the action in which he was arrested sooner or later by bringing the facts to the attention of the Court, but that consideration is not

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enough to prevent the wrongful arrest of a stranger away from his friends, probably unable to give security and without counsel, from being a very grievous form of duress, and it requires no innovation to decide that money paid to be free from it may be recovered."

Here, under legal advice, the plaintiff had avoided any active inducement of the defendant to come to Massachusetts to adjust the claim, thinking this would avoid the fraud referred to in the cases. I cannot accept this view. The plaintiff (i.e., the manager of the company) in his reply held himself out as ready to negotiate with the defendant if he came to Boston. He acted fraudulently when he formed the plan to arrest, and, concealing this, permitted the defendant to walk into the net spread for him, and swore to all that was necessary to accomplish the arrest before he entered upon any discussion. The intent to secure arrest while arranging an interview to negotiate a settlement is the gist of the fraud, and inquiry as to who suggested the interview or the place of interview is quite beside the mark. The procuring of the defendant's attornment to the jurisdiction of the Courts of the Commonwealth by the attendance to discuss settlement constitutes the fraud: *Stein v. Valkenhuysen* (1858), E. B. & E. 65.

*Grainger v. Hill* (1838), 4 Bing. N.C. 212 (referred to as law in Massachusetts in the cases cited), shews that it is not necessary to set aside the process or shew that the action has terminated in the defendant's favour before suing.

*Duke de Cadaval v. Collins* (1836), 4 A. & E. 858, also aids the defendant here. When there was an arrest of a foreigner upon a false affidavit, money paid for his discharge was recovered as paid under duress.

I cannot see any distinction as to the fraud being in the false statement as to debt existing, and fraud and false statement in any other requisite to the issue of process, or in the concealing of the true facts and circumstances connected with the defendant's movements and intentions.

The duress which gives a right to recover money paid affords ample defence to an action upon the cheque here given.

For these reasons, I would dismiss the action with costs.

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Sept. 24.

## LONDON AND WESTERN CANADA INVESTMENT CO. v. DOLPH.

*Chose in Action—Assignment of—Agreement for Purchase of Interest in Land—Action by Assignee—Defences—Covenant to Pay—Condition Precedent—Fraudulent Misrepresentation by Assignor as to Price—Equity of Covenantor to Rescind—Assignment Subject to Equity—Failure of Action by Assignee—Costs.*

The defendant gave M. \$1,000 to invest as he (M.) pleased; the defendant said he would put in no more money. M. then said he had bought a parcel of land for \$16,000 and had put the \$1,000 into it; he proposed that the defendant should pay \$2,200 more; in instalments, and take a one-fifth interest in the parcel; he sent the defendant for his signature a written agreement to pay the \$2,200. The defendant, after investigation, signed the agreement:—

*Held*, that the defendant could not be heard to say that he did not promise to pay as he covenanted—that the \$1,000 was paid as a condition precedent to an understanding that he was not to comply with his covenant.

M. said that the parcel cost \$16,000, so that the defendant was obtaining his one-fifth at cost. The price was in fact \$15,000, as M. knew:—

*Held*, that the misrepresentation made was material, and gave the defendant an equity to rescind the contract; the plaintiffs, to whom M. had conveyed the land and assigned the defendant's agreement, took subject to this equity; and their action for the \$2,200 failed.

There was nothing to prevent the assignor, M., from disclosing his fraud or to preclude the defendant from relying upon it.

*Stoddart v. Union Trust Limited*, [1912] 1 K.B. 181, and *Roxburghe v. Cox* (1881), 17 Ch. D. 520, 526, distinguished.

The action was dismissed without costs.

ACTION by the assignees of a certain agreement to recover money due thereunder.

September 19. The action was tried by MIDDLETON, J., without a jury, at a Toronto sittings.

*J. W. Bain*, K.C., and *J. S. Duggan*, for the plaintiffs.

*J. E. Jones*, for the defendant.

September 24. MIDDLETON, J.:—Sylvester Moyer agreed with the defendant to sell him a one-fifth interest in certain lands for \$3,200. The lands have been conveyed to the plaintiffs and the agreement assigned to them.

Two defences are raised. The defendant paid \$1,000 on account of the purchase-price, and covenanted to pay the balance in three instalments. He now says that "as a condition precedent to his advancing the \$1,000 and upon the signing of the alleged agreement it was understood that the limit of the defendant's

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liability was the advance of the said \$1,000." This is not true in fact and meaningless in law.

Moyer and Dolph were friends, and Dolph gave Moyer \$1,000 to invest for him; and no doubt it is true that he then said he would not put in any more money. Moyer was to invest as he pleased.

Moyer then said he had bought a parcel for \$16,000, and put the \$1,000 into it, and sent Dolph the agreement calling for \$2,200 further, in instalments. Moyer had no right to call for this, and Dolph was under no obligation to sign. He kept the agreement, went west, and satisfied himself and signed.

He cannot now be heard to say that he did not promise to pay as he covenanted; and it is absurd to say that the \$1,000 was paid as a condition precedent to an understanding that he was not to comply with his covenant. This defence fails.

More serious is the second defence. Moyer said the parcel cost \$16,000, so Dolph was obtaining his one-fifth at cost. The price was \$15,000, and this was known to Moyer, though he pretends he only afterwards found it out.

Moyer, after assigning the agreement, is now attempting to aid Dolph in resisting payment, and proclaims his own fraud to assist his friend and defeat his assignee. He makes a weak and manifestly untrue explanation of his conduct.

The misrepresentation made was material, and gives Dolph an equity entitling him to rescind the contract; and the assignees of the contract take subject to this equity.

If for any reason the right to rescind had been lost so that the claim would be for deceit, this would not attach to the contract in the hands of the assignee: *Stoddart v. Union Trust Limited*, [1912] 1 K.B. 181; but the reasoning of that case is based upon the distinction between the right to rescind and the right to claim damages. See also *T. & J. Harrison v. Knowles & Foster*, [1918] 1 K.B. 608.

"An assignee of a chose in action, according to my view of the law, takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception:" *per* James, L.J., in *Rox-*



*burgh v. Cox* (1881), 17 Ch.D. 520, 526. This, however, does not prevent the assignor from disclosing his own earlier fraud, nor does it preclude the defendant from relying upon it.

The action fails; but, in the circumstances, I give no costs. So far as the defendant knew when sued, he had no real defence, and only found out Moyer's unworthy conduct pending suit. Moyer's unjust attempt to make \$200 relieves the defendant from \$2,200, and defeats the plaintiffs to that extent.

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WEYBURN TOWNSITE CO. LIMITED v. HONSBURGER.

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Oct. 2.

*Company—Incorporation of Saskatchewan Company by Memorandum of Association under Saskatchewan Companies Act—Doing Business in Ontario—Sale in Ontario of Saskatchewan Land to Citizen of Ontario—General Right of Foreign Incorporated Company to Carry on Business outside of Country of Incorporation—Comity—Limitation of Right—Lack of Plenary Sovereign Authority in Incorporating Province—Limited Power Exercisable by Province—Contract Made in Ontario beyond Powers of Company—Effect of Ontario License Granted Six Years after Contract—Extra Provincial Corporations Act, secs. 6, 7 (1), 12, 16—Limitation of sec. 16 to Companies Created by Sovereign Authority Possessing Plenary Powers—Royal Prerogative not Exercised in Creation of Company—License Ineffective—Saskatchewan Act Passed in 1917 Amending Companies Act and Purporting to Empower Company to Accept Extra Provincial Powers—Ultra Vires as regards Effect upon Action in Ontario—Defence to Action by Company for Specific Performance—Misrepresentation—Failure to Prove—Collateral Independent Warranty as to Resale—Absence of Intention—Amendment—Condition Subsequent—Oral Evidence—Statute of Frauds.*

The plaintiff company was incorporated under the Saskatchewan Companies Act, by memorandum of association dated the 23rd March, 1912. The memorandum provided that the objects for which the company was established were to carry on real estate, loan, and general brokerage business. No limitation or extension of the powers was contained in the memorandum. In October, 1912, the chief executive officers of the company, being in Ontario, visited the defendant, who resided in Ontario, and entered into an oral agreement with him for the sale to and purchase by him of land in Saskatchewan. A promissory note in favour of the plaintiff company was then signed and delivered by the defendant, to cover the first instalment of the purchase-price. A written agreement was afterwards drawn up in Saskatchewan, executed by the company there, and executed by the defendant in Ontario. The company sued for specific performance of the agreement; the defendant pleaded that the contract was *ultra vires*, and also that it was induced by misrepresentations; and he counterclaimed for rescission, delivery up of the promissory note, and repayment of a sum paid on account of the purchase-price:—

*Held*, that the sale of the land was made in Ontario, and that the company in what it did there by its officers and agents was assuming to exercise powers and acquire rights outside of Saskatchewan.

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(2) That a foreign incorporated company has, by comity, the right (subject to certain limitations) to carry on business and make contracts outside of the country if its incorporation.

*Howe Machine Co. v. Walker* (1874), 35 U.C.R. 37, and *Canadian Pacific R.W. Co. v. Western Union Telegraph Co.* (1889), 17 S.C.R. 151, followed.

The plaintiff company was subject to limitations arising from lack of plenary sovereign authority in the incorporating Province: it possessed only such powers and capacities as could be bestowed upon it in Saskatchewan under the provisions of the general Companies Act of that Province; by the British North America Act, the Province has power to incorporate companies with provincial objects only; and the implied permission to carry on its business generally, which, by comity, would have been conferred on this company if incorporated by plenary sovereign authority, was not possessed by it owing to the limited power of incorporation exercisable by the Province.

*Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566, distinguished. Therefore, the act or the company in coming into Ontario in 1912 and assuming to sell its land to the defendant and to acquire rights against him was, quite apart from the Ontario Extra Provincial Corporations Act, *ultra vires* at the time of the transaction.

(3) That an Ontario license granted to the company in 1918, under the Extra Provincial Corporations Act, R.S.O. 1914, ch 179, conferred powers as of its date only, and did not operate from the time when the company entered Ontario so as to validate its subsequent corporate acts.

Sections 6, 7 (1), 12, and 16, considered.

Section 16 (2) does no more than remove, as of a time immediately preceding the commencement of the 'action or other proceeding' therein referred to, the disability created by sec. 7.

The power and right of the company to carry on business in Ontario arose for the first time (if ever) on the granting of the license; and the words of sec. 16 must, in that regard, be taken as applicable only to foreign companies created by a sovereign authority possessing plenary powers—English or French companies, for example—which, except as inhibited by Ontario statutes, are entitled by comity to enter Ontario and make contracts.

The license granted in 1918 had no bearing on the validity of the contract made in 1912.

(4) That the company, being incorporated by memorandum and certificate under the Saskatchewan Companies Act, was not a common law corporation, and possessed no capacity to apply for or receive any power or right outside of Saskatchewan. Whether the Royal Prerogative in respect to the incorporation of companies does or does not exist in Saskatchewan, it was not exercised in the incorporation of this company; and it had no power originally to apply for or accept a license to carry on business in Ontario. *Dictum* in the *Bonanza Creek* case, [1916] 1 A.C. at p. 584, applied.

(5) That sec. 13a., added to the Saskatchewan Companies Act by an Act passed in 1917, which provides that a company created by or under the authority of the Companies Act shall, unless a contrary intention is expressed in the memorandum of association, have and be deemed to have had since incorporation the capacity of a natural person to accept extra provincial powers and rights, and to exercise its powers beyond the boundaries of the Province to the extent to which the laws in force where such powers are to be exercised permit, is, with regard to acts done prior to the passing of the Act of 1917, as against a citizen of Ontario, beyond the powers of a Provincial Legislature.

The contract being wholly *ultra vires*, not binding either on the company or on the defendant, and enforceable by neither, it was beyond the power of the Saskatchewan Legislature to pass legislation which should indirectly have the effect of conferring on the company a valid right of action in the Courts of Ontario against an Ontario citizen.

*Royal Bank of Canada v. The King*, [1913] A.C. 283, 298, applied and followed.

(6) That, upon the evidence, the parties did not intend the representation (if any) respecting a resale to amount to a warranty that the company would resell; and, if leave to amend by setting up such a warranty were asked by the defendant, it should not be granted.

*Canadian General Securities Co. Limited v. George* (1918), 42 O.L.R. 560, distinguished.

*Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30, followed.

(7) That, if the representations were put forward as amounting to a condition subsequent, providing for the discharge of the contract, that condition would be a material term inconsistent with the written terms of the contract; and, as the contract is required by the Statute of Frauds to be in writing, parol evidence of the inconsistent term would be inadmissible.

(8) That, in so far as the representations which were made on behalf of the company were matters of fact, they were, upon the evidence, true; and, so far as they were representations that certain events would happen in the future, the company and its officers and agents believed the representations made to be true and had reasonable ground for such belief

AN action by the vendor-company for specific performance of an agreement for the purchase and sale of lots 13 to 20 inclusive in block 17 in Grand Trunk Place, Townsite of Weyburn, in the Province of Saskatchewan.

The action was brought in the Supreme Court of Ontario.

March 26 and 27. The action was tried by MASTEN, J., without a jury, at a Toronto sittings.

*W. N. Tilley*, K.C., and *J. W. Payne*, for the plaintiff company.

*A. Courtney Kingstone*, for the defendant.

October 2. MASTEN, J.:—The defendant sets up two defences: first, as a matter of law, that at the time of entering into the agreement in the pleadings mentioned the plaintiff (a corporation incorporated under the laws of the Province of Saskatchewan) was, without power so to do, assuming to carry on business within the Province of Ontario, and that the contract in question is consequently *ultra vires* and void; second, that the defendant was induced to enter into the agreement in question by reason of certain misrepresentations, to which I shall hereafter refer more fully.

In paragraph 12 of the defence the defendant repeats by way of counterclaim the allegations of his defence and claims that his note for \$1,000 referred to in the pleadings be delivered up to be cancelled and that a sum of \$115.75 paid by him on account of the contract in question be repaid to him.

I deal with these contentions in the order above stated.

The facts upon which the first defence is founded are as follows:—

The plaintiff company was incorporated under the Saskatche-

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wan Companies Act, by memorandum of association dated the 23rd March, 1912. This memorandum provides, by clause 3, as follows:—

“The objects for which the company is established are to carry on real estate, loan, and general brokerage business.”

No limitation or extension of this power is contained in the memorandum.

The incorporators were:—

George M. Bowman..... 20 shares.

James J. Griffin..... 20 shares.

N. D. McKinnon..... 20 shares.

Frank Moffit..... 20 shares.

C. H. Hartney..... 20 shares.

The certificate of incorporation is as follows:—

Canada.

Province of Saskatchewan.

No. 103.

I hereby certify that Weyburn Townsite Company Limited is this day registered under the Act respecting Companies and that the company is limited.

Given under my hand and seal at Regina this twenty-seventh day of March, 1912.

Head office, Weyburn.

Capital.....\$10,000

No. of shares.....100

(Seal)

Edward J. Wright,

Registrar of Joint Stock Companies.

On the 8th February, 1918, the plaintiff for the first time procured a license under letters patent issued under the great seal of the Province of Ontario, pursuant to the Extra Provincial Corporations Act, R.S.O. 1914, ch. 179, to the terms of which I shall hereafter refer more fully.

In the year 1912 George M. Bowman and James J. Griffin, shareholders, directors, and chief executive officers of the plaintiff company, came to the Province of Ontario for the purpose of selling lands of the plaintiff company situate in the outskirts of the City of Weyburn, Province of Saskatchewan. On or about the 15th October, 1912, they, accompanied by one Melvin Gayman, an insurance and general agent carrying on business at the City of St. Catharines, visited the defendant at his farm in the County of

Lincoln with the purpose of selling him some of these Weyburn lots. Gayman at that time and afterwards was the local agent of the plaintiff company duly appointed to act in connection with sales of land made by it in the vicinity of St. Catharines.

At this interview a verbal agreement was entered into for the purchase by the defendant from the plaintiff company of the lands in question, at the price of \$4,000, and a promissory note in favour of the plaintiff for \$1,000 dated the 15th October, 1912, was then signed and delivered by the defendant, to cover the first instalment of the purchase-price. The note bore interest at 7 per cent., and was payable on the 1st January, 1913, at the Sterling Bank of Canada, Jordan Station, Ontario. It is marked exhibit No. 2.

The alleged misrepresentations, to which I shall hereafter refer, were made at this interview and negotiation. The written agreement evidencing the sale in question appears to have been drawn up after Bowman and Griffin returned to Weyburn, for in a letter dated the 25th October, 1912, from Bowman and Griffin to Gayman, the following passage occurs:—

“Re lots 13 to 20 block 17 Grand Trunk Place, J. F. Honsburger. We herewith enclose agreements for signature of this party. Please return one copy to us upon its completion.”

Thereafter the agreements were executed by the defendant in Ontario, and both copies returned to Weyburn, where they were executed by the plaintiff company; and on the 12th December, 1912, one copy was sent down to the defendant. This agreement is filed as exhibit No. 1.

The defendant, in or about the month of December, 1912, paid \$15.75 interest on account of the \$1,000 note. This payment was made at St. Catharines, to Gayman as agent for the plaintiff. Subsequently, in or about October, 1913, he paid a further sum of \$100 on account of the note, this payment also being made to Melvin Gayman.

The law of Saskatchewan is admitted, without expert evidence, as appearing in the statutes of that Province.

These being the facts, I proceed to discuss the law bearing upon the defence that the contract in question is *ultra vires*. This defence is based upon various contentions:—

The first is, that the sale of lands here in question was made in Ontario; that the plaintiff company under its incorporating

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instruments, namely, the Saskatchewan statute and memorandum of association, was at the date of the contract incapable of exercising powers or possessing rights outside the limits of Saskatchewan; and consequently that the agreement in question was, when made, beyond the powers of the plaintiff company.

To this defence the first reply made by the plaintiff is, that the plaintiff company did not in fact exercise its powers in the Province of Ontario, and that whatever it did in relation to this contract was done wholly in Saskatchewan: that the contract in question only came into legal existence when it was signed, sealed, and posted by the plaintiff company at Weyburn; and hence that the only act of the company which places it under legal obligation was done in Saskatchewan. It is obvious that, if the defendant had written to the plaintiff company in Saskatchewan, offering to buy the lands in question on specified terms, and if the company had then at a meeting of directors in Weyburn accepted the defendant's offer and mailed him an acceptance, the company would not, up to that point, have been doing any act outside of Saskatchewan. The plaintiff's argument on the point now under consideration appears to assume that this was in substance what was done.

But, upon a close scrutiny of the facts, it seems to me otherwise. The agreement sued on is dated the 15th October, 1912. The only agreement made between these parties was the agreement which was negotiated on that date, at Jordan, Ontario, between Gayman, Bowman, and Griffin, agents of the company, of the one part, and the defendant, of the other part. The company subsequently treated what took place on the 15th October not as an offer but as an existing agreement which the company then ratified as of the 15th October and confirmed and evidenced by executing under its corporate seal a formal written agreement bearing date the 15th October.

In some aspects the question is cognate to but not identical with that which formerly arose in determining the jurisdiction of Division Courts. In those cases the question was, "Where did the cause of action arise?" In the present case it seems to me that the question is, whether the sale in question is essentially bottomed on acts of the plaintiff company done outside the territorial limits of Saskatchewan.



When the plaintiff company appointed Gayman, a resident in Ontario, to be its permanent representative and agent in St. Catharines, and when he, along with the president and secretary of the company, approached the defendant at his residence in Ontario, sold him the lands in question, made the agreement of which exhibit 1 afterwards became the written record, and at the same time received from him, as part of the purchase-price, the promissory note (exhibit 2) payable in Ontario, and when Gayman at St. Catharines afterwards received from the defendant payments on account of the price and renewals of the note, the plaintiff company was, I think, carrying out in Ontario essential parts of the transaction in question, and was assuming to exercise powers and acquire rights outside of Saskatchewan.

In so far as the question is one of fact, I so find on the evidence.

It therefore becomes necessary to inquire whether, at the date of this contract, the 15th October, 1912, the plaintiff company was legally competent to do in the Province of Ontario those things it assumed to do in relation to the matters in question.

Counsel for the plaintiff contended that, apart from the Extra Provincial Corporations Act of Ontario, foreign companies generally have, by comity, the right to make contracts in Ontario, and that a company incorporated under the laws of Saskatchewan comes within this principle, and possesses, by virtue of the doctrine of comity, the same powers and capacities in Ontario as are accorded to a company incorporated by the authority of a foreign State possessing plenary sovereign powers, e.g.; an English company or a French company; consequently that, but for the limitations contained in the Ontario Extra Provincial Corporations Act, the plaintiff had, by comity, the right to sell its lands here; and that when, in February, 1918, it obtained a license under the Extra Provincial Corporations Act, any bar to the prosecution of this action was lifted, and the plaintiff company now stands before the Court in the same position as though it had acquired, prior to the 15th October, 1912, a license effective to confer on it legal authority to sell its lands in Ontario. I shall deal with this argument by first considering what, at the date of the agreement in question, were the powers and capacity of the plaintiff company apart from the Ontario Extra Provincial Corporations Act, and apart from the license subsequently issued

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thereunder. In other words, what would have been the position of the plaintiff company under the doctrine of comity if there were no Extra Provincial Corporations Act in force in the Province of Ontario? The question so raised demands a scrutiny of the doctrine of comity as it is applied in Ontario.

The doctrine of comity was enunciated in its present form by Story in his *Conflict of Laws*. In his discussion of the subject he says (sec. 29):—

“Huberus has laid down three axioms, which he deems sufficient to solve all the intricacies of the subject. The first is, that the laws of every empire have force only within the limits of its own government, and bind all who are subjects thereof; but not beyond those limits. The second is, that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof. The third is, that the rulers of every empire from comity admit that the laws of every people in force within its limits, ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments, or of their citizens.”

And in further discussing the subject he says (sec. 38):—

“In the silence of any positive rule, affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government unless they are repugnant to its policy, or prejudicial to its interests. It is not comity of the courts, but the comity of the nation which is administered and ascertained in the same way and guided by the same reasoning, by which all other principles of the municipal law are ascertained and guided. The doctrine of Huberus would seem, therefore, to stand upon just principles; and though, from its generality, it leaves behind many grave questions as to its application, it has much to commend it in point of truth, as well as of simplicity. It has accordingly been sanctioned both in England and America by a judicial approbation, as direct and universal as can fairly be desired for the purpose of giving sanction to it as authority, or as reasoning.”

The general doctrine enunciated by Story was more fully stated and was applied to the case of a foreign company by the Supreme Court of the United States in the leading case of *Bank of Augusta v. Earle* (1839), 13 Peters 519. It has been adopted in

our jurisprudence, as appears by the judgment of the Supreme Court of Canada in *Canadian Pacific R.W. Co. v. Western Union Telegraph Co.* (1889), 17 S.C.R. 151. At p. 155, the Chief Justice says: "The comity of nations distinctly recognises the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation, and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restrictions and burthens imposed by the laws enforced therein." And the reasoning in *Bank of Augusta v. Earle* is quoted at length and its doctrine approved.

That decision was rendered on an appeal from the Province of New Brunswick, but the same principle had already been fully adopted in Ontario in the case of *Howe Machine Co. v. Walker* (1874), 35 U.C.R. 37; and, so far as I am aware, has ever since been maintained without question; see also the decision of the Privy Council in *Bateman v. Service* (1881), 6 App. Cas. 386.

Whether the recognition of the foreign corporation rests wholly on comity (which is the view generally accepted), or on the view that a corporation, being an entity, is legally capable of existing within a foreign jurisdiction (*De Beers Consolidated Mines Limited v. Howe*, [1905] 2 K.B. 612, at p. 635), in either view the principle is subject to a corollary that the foreign corporation "has only such powers as were given to it by the authority which created it" (Story's Conflict of Laws, ch. 4, sec. 106), quoted with approval in *Canadian Pacific R.W. Co. v. Western Union Telegraph Co.*, 17 S.C.R. at p. 163. In *Bank of Augusta v. Earle* this corollary was stated in the following words (13 Peters at p. 589): "The corporation must no doubt shew, that the law of its creation gave it authority to make such contracts, through such agents."

An excellent illustration of the application of this limitation is afforded by the case of *Seattle Gas and Electric Co. v. Citizens' Light and Power Co.* (1903), 123 Fed. Repr. 588. The defendant company was incorporated under the General Corporation Law of New Jersey, and was carrying on its operations in the City of Seattle, in the State of Washington. It was conceded on the argument that the State of New Jersey had a statute providing specially for the formation of corporations to manufacture and sell

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illuminating gas and to acquire the right to use the public streets; that the Courts of New Jersey had held that this Gas Act was the only law under which corporations might be organised in New Jersey for the purpose of carrying on a gas manufacturing business; and that the right to exercise the privilege of laying gas-pipes and conducting gas-business was not within the scope of the charter-rights of a corporation organised under the General Corporation Law of the State. The judgment quotes as follows from the opinion of Mr. Justice Story in the case of *Bank of the United States v. Dandridge* (1827), 12 Wheat. 64: "And it may be safely assumed that a corporation can make no contracts and do no acts, either within or without the State which creates it, except such as are authorised by its charter." In the result the Court held that, owing to the limitations arising from its incorporation as above stated, the defendant corporation was without power to engage in the business of manufacturing and selling gas to consumers in the State of Washington.

The general principle has obtained in our law from the earliest times (see *Henrique v. Dutch West India Co.* (1728), 2 Ld. Raym. 1532, and *Newby v. Colt's Patent Firearms Co.* (1872), L.R. 7 Q.B. 293, at p. 294), and forms part of our jurisprudence in Ontario.

The powers and capacities which the plaintiff company acquired upon its incorporation in Saskatchewan are, therefore, to be recognised in the Courts of Ontario, subject to scrutiny as to any limitations by which those powers and capacities are modified. Such limitations appear to divide themselves into three classes: first, limitations arising from the provisions of the statute under which the company is incorporated or from the provisions of its charter or memorandum of association; second, limitations arising from some inconsistency with the laws of Ontario; third, limitations arising from lack of plenary sovereign authority in the incorporating State.

In the present action no limitation of the first or second class is presented, but question does arise under the third class. Where the incorporating authority itself has only a limited power of incorporation, the general words of the charter or memorandum of association must be read subject to that limitation, for the company can possess no greater powers than its creator has power

to bestow on it. The plaintiff company, being incorporated by the Province of Saskatchewan under its general Companies Act of 1912, possessed only such powers and capacities as could be bestowed upon it in that Province under the provisions of that Act. By the British North America Act, the Province has power to incorporate companies with provincial objects only.

In *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566, 26 D.L.R. 273, the Privy Council determined that the words "legislation in relation to the incorporation of companies with provincial objects" preclude the grant by the incorporating Province "of powers and rights in respect of objects outside the Province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*." In that case it was held that the Bonanza Creek Company was incorporated as a common law corporation by the exercise of the Royal Prerogative, and, having been adequately called into existence, it had applied for and received from the local authorities of the Yukon all necessary powers. But the facts in the present case are entirely different, and I am unable to arrive at any conclusion other than that the plaintiff company did not by its constating instruments acquire subjectively any powers or rights in respect of objects outside of Saskatchewan; in other words, that the implied permission to carry on its business generally, which, in view of the general recognition of the doctrine of comity, would have been conferred on this company if incorporated by plenary sovereign authority, is not possessed by it owing to the limited power of incorporation exercisable by the Province of Saskatchewan. The company having no implied permission by its charter to operate outside of Saskatchewan, the Courts of Ontario could not, by comity alone, recognise its contracts made here.

Considering the question, then, apart from the Ontario Act respecting Extra Provincial Corporations, and apart from the license issued thereunder, I think that the assumed exercise by the plaintiff of powers in Ontario and its assumed acquisition of rights against this defendant could not be recognised by this Court under the doctrine of comity. The fundamental postulate of the plaintiff's argument is, therefore, not conceded, and the act of the plaintiff company in coming into Ontario in the year 1912

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and assuming to sell its lands to the defendant and to acquire rights against him was, in my opinion, *ultra vires* at the time of the transaction, and, unless aided by the license subsequently issued under the Extra Provincial Corporations Act of Ontario, so remains. The defendant could not, under the doctrine of comity alone, have enforced a claim for specific performance against the plaintiff; and, consequently, the contract sued on would, apart from the license, have been unenforceable against the defendant for want of mutuality.

It remains, however, to consider the question, what is the legal effect of the Ontario license granted to the plaintiff company in 1918? Does it confer powers as of its date only, or does it operate *nunc pro tunc* as from the time when the company first entered Ontario, and validate all its subsequent corporate acts? To determine this question it is necessary to consider the provisions of the Extra Provincial Corporations Act of Ontario and the terms of the license granted to the plaintiff company.

The provisions of the Extra Provincial Corporations Act, so far as they relate to the question now under consideration, are substantially as follows:—

“6. A corporation coming within class 9” (to which class the plaintiff company belongs) “may, upon complying with the provisions of this Act and the Regulations, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers in Ontario as may be embraced in the license; subject however to such limitations and conditions as may be specified therein.

“7.—(1) No Extra Provincial Corporation coming within class 7 or 8 or 9 shall carry on within Ontario any of its business unless and until a license under this Act so to do has been granted to it, and unless such license is in force; and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in any other capacity for any such Extra Provincial Corporation, carry on any of its business in Ontario unless and until such corporation has received such license and unless such license is in force.”

“12. A corporation receiving a license may, subject to the limitations and conditions of the license, and subject to the provisions of its own charter, Act of incorporation or other instrument



creating it, acquire, hold, mortgage, alienate and otherwise dispose of real estate in Ontario and any interest therein to the same extent and for the same purposes as if such corporation had been incorporated under the Ontario Companies Act with power to carry on the business and exercise the powers embraced in the license."

"16.—(1) If any Extra Provincial Corporation coming within class 7 or 8 or 9, contrary to the provisions of section 7, carries on in Ontario any part of its business, such corporation shall incur a penalty of \$50 for every day upon which it so carries on business; and so long as it\* remains unlicensed it shall not be capable of maintaining any action or other proceeding in any Court in Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of said section 7.

"(2) Upon the granting or restoration of the license, or the removal of any suspension thereof, such action or other proceeding may be prosecuted as if such license had been granted or restored or such suspension had been removed before the institution thereof."

The terms of the license granted by the Province of Ontario to the plaintiff company in the year 1918 are as follows:—

"We do by this our Royal License hereby authorise the Weyburn Townsite Company Limited to exercise and enjoy within our Province of Ontario the rights and powers and privileges necessary to enable the corporation to carry on the business hereinafter specified that is to say:

"(a) To carry on real estate and general brokerage business, and

"(b) To do all things incidental or conducive to the attainment of the above objects."

In so far as the license confers on the plaintiff company *ab extra* new powers and rights in Ontario, it purports on its face to operate as from the date of its issue, and no comment of mine can make plainer the meaning of the words which I have quoted above.

\*By sec. 31 of the Statute Law Amendment Act of 1918, 8 Geo. V. ch. 20, assented to on the 26th March, 1918, sec. 16 was amended by striking out the word "it" and substituting "any extra provincial corporation coming within class 9."

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Manifestly the license was intended to confer these powers only as of its date, and I think that the statute carries it no further. I think that sec. 16, sub-sec. 2, must be considered as doing no more than removing, as of a time immediately preceding the issue of the writ, the disability created by sec. 7.

In my view, the Act, coupled with the license, yields two results: first, with respect to claims and rights of any foreign company validly acquired under the doctrine of comity at or prior to the date of the license, it enables the company to have access to the Courts of Ontario for their enforcement and removes the bar created by sec. 7 of the Act; second, as and from the date of its issue it confers *de novo* on the licensed company such rights and powers as are specified in the license (if the company has capacity to accept such rights and powers).

As a corporation incorporated by a Province of Canada differs from a company created by a sovereign authority like Great Britain, France, or Italy, in that it is, by the terms of the statutes under which it is incorporated, incapable of exercising any powers or rights outside the confines of its home Province unless and until it has received *ab extra* the necessary power and authority, the words of sub-sec. 2 of sec. 16 of the Ontario Extra Provincial Corporations Act are ineffective in relation to such companies, because the power and right of such a company to carry on business in Ontario only arise for the first time on the granting of the license; and the words of sec. 16 must, in that regard, be taken as applicable only to foreign companies created by a sovereign authority possessing plenary powers (e.g., English or French companies), which, except as inhibited by the Ontario statutes, are entitled by comity to enter Ontario and make contracts.

The idea may be expressed in another way. In the case of an English or a French company the license sanctions the maintaining of an action for the enforcement of a contract made in the exercise of powers which the company already possesses by virtue of the doctrine of comity, but in the case of a Saskatchewan company its powers in Ontario must be taken to be conferred for the first time by the license, and are a new grant by Ontario authority.

As the Ontario license was granted to the plaintiff company only on the 8th February, 1918, such powers or rights, if any, as are conferred by it first arise on that date, and have no bearing

on the validity of the contract in question, which was made in 1912. The result is that until the license was granted by Ontario to the plaintiff company (in February, 1918) it possessed no powers or rights in respect of objects outside Saskatchewan. The Ontario license assumed to confer on it (if it was legally competent to receive them) powers and rights as from the date of the license, but did not confer such powers and rights as of a date when they had not been applied for.

If I am right in these views, they suffice to dispose of the present case. But the further contention urged by counsel for the defendant goes one step deeper, and submits that a company incorporated by memorandum of association and certificate under the Saskatchewan Companies Act is not a common law corporation like the Bonanza Creek Company, and possesses no capacity to apply for or receive any power or right outside of Saskatchewan.

In the *Bonanza Creek* case the company in question was an Ontario company, incorporated by charter signed by the Lieutenant-Governor, and it was determined that the company was a common law corporation created not exclusively under the Ontario Companies Act, but also by the Lieutenant-Governor as the representative of the Sovereign in the exercise of the Royal Prerogative, which belonged to the Governor-General of Canada before Confederation, and which descended from him to the Lieutenant-Governor of Ontario under the terms of the British North America Act.

In the present case the defendant contends that, as Saskatchewan was created a Province after the British North America Act was passed, the Royal Prerogative in respect to the incorporation of companies never existed in that Province, and is not exercisable by the Lieutenant-Governor; and, secondly, that, whether such power exists or not, it was not exercised in connection with the incorporation of this company.

I should hesitate to express an opinion on the first point, viz., as to the prerogative powers of the Lieutenant-Governor of Saskatchewan, without a more elaborate discussion and consideration of the provisions of the British North America Act and of the instructions governing the Lieutenant-Governor in the exercise of his office. But it is unnecessary for me to decide that point, because I am clearly of opinion that the second point is well taken.

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The plaintiff company was incorporated in 1912—purely and solely pursuant to a statute resembling the English Companies Act, unaided by the exercise of the prerogative power. The memorandum of association did not purport to allow the company to exist for the purpose of carrying on business outside the provincial boundaries, or empower it to apply for or receive *ab extra* power so to do, and the statute under which the incorporation took place did not authorise, and therefore excluded, incorporation for such a purpose.

The case appears to me to fall precisely within the words used by Viscount Haldane in the *Bonanza Creek* case, [1916] 1 A.C. at p. 584, 26 D.L.R. at p. 284, where he says: "In the case of a company the legal existence of which is derived wholly from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies."

I therefore hold that the plaintiff company had originally no power to apply for or accept a license to carry on business in Ontario.

But it is urged that all that has been changed by a Saskatchewan statute passed in 1917, ch. 34 of the statutes of that year (1st sess.), sec. 42, adding sec. 13a. to the Companies Act:—

"13a. Every company heretofore or hereafter created:

"(a) by or under the authority of any general or special ordinance of the North-West Territories; or

"(b) by or under the authority of the Companies Act, being chapter 72 of the Revised Statutes of Saskatchewan, 1909, or under this Act or any Act that may hereafter be substituted therefor; or

"(c) under any general or special Act of this Legislature;

"shall, unless a contrary intention is expressed in a special Act or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extra provincial powers and rights, and to exercise its powers beyond the boundaries of the Province to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are

concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the great seal."

I express no opinion on the effect of that legislation in relation to acts of the plaintiff company done after it was passed in 1917; but, with regard to acts done prior to the passing of the Saskatchewan statute, I am clearly of opinion that such legislation is, as against a citizen of Ontario, beyond the powers of a Provincial Legislature. The Legislature of Saskatchewan can, within its territorial limits, enact not only that black is white, but also that it always has been white, and the Courts of Saskatchewan will be bound to re-echo and enforce such an enactment. But, when such a statute is presented to an Ontario Court for the purpose of imposing a liability on an Ontario citizen, the Courts of Ontario are at liberty to inquire whether black is really white or not.

If I am right in the views which I have expressed above, then from 1912 to 1917 the plaintiff company possessed no powers or rights in Ontario either by comity or otherwise, and down to 1917 was wholly unable, by applying for a license, or by any other step, to acquire such rights. The contract was wholly *ultra vires*, and was not binding either on the plaintiff company or on the defendant; apart from all other defences, it was void for want of mutuality. Being, therefore, a contract which neither party could specifically enforce, how then can the Legislature of Saskatchewan in 1917 pass legislation which shall indirectly have the effect of conferring on the plaintiff company a valid right of action in the Courts of Ontario against an Ontario citizen? The case seems to me to fall directly within the principles enunciated in the decision by the Privy Council in the case of *Royal Bank of Canada v. The King*, [1913] A.C. 283, at p. 298, 9 D.L.R. 337, at p. 346.

For these reasons, I am of opinion that the plaintiff's claim fails and must be dismissed. Consequently it is unnecessary to deal with the second defence, viz., misrepresentation. But, as this defence rests largely on facts, and as an appellate Court may not agree with the conclusions of law which I have just expressed, it seems desirable that I should state my views on this second ground of defence.

Dealing then with the question of misrepresentation, I observe

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in the first place that the plaintiff's claim is for specific performance and the defendant's counterclaim is for rescission of the contract and return of his note and of the \$115.75 paid by him. In the recent case of *Canadian General Securities Co. Limited v. George*, decided by the Second Divisional Court on the 25th March, 1918, 42 O.L.R. 560, effect was given as an independent warranty to a representation made by the vendor at the time of the sale that he, the vendor, would resell the property at a profit within six months. In that case it was held that the representation as to resale amounted to an independent collateral contract, not inconsistent with the main agreement, which need not be incorporated with the original agreement of purchase, was admissible in evidence, and to which effect could be given. In the present case no such relief is sought by the defendant's counterclaim, and, contrary to the usual practice now prevailing at trials, no application was made by counsel to amend. But, if application for leave so to amend had been made, I should have felt bound to refuse it.

In the case of *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30, 49, the House of Lords re-affirmed the principle of law laid down in very early days by Holt, C.J., with respect to a warranty collateral to an agreement of sale, in the following words: "An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended." And the Lords negative the view that the making of any representation prior to a contract and relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true, and therefore gives a right to damages if such should not be the case.

In the present case I am of the opinion, upon all the evidence adduced, and find, that the parties did not intend the representation (if any) respecting a resale to amount to a warranty that the plaintiff would resell, and I also find that the defendant did not at the time of the contract think that he had received any such warranty. On this basis I would have refused leave to amend it if it had been asked.

The action is, therefore, in this aspect, to be dealt with strictly as a claim for specific performance by the plaintiff and for rescission by the defendant; the conclusion to be reached depending in this phase of the case on the alleged misrepresentations set forth in the statement of defence.



[The learned Judge then set out the facts on this branch as they appeared before him in evidence.]

No claim that the contract was originally induced by misrepresentation of existing facts appears to have been put forward prior to 1915, and the first time that it is now suggested that it was put forward was when one George W. McFarlane was sent on behalf of the defendant and others to examine the property and to interview the plaintiff.

McFarlane was examined as a witness, and his evidence is enlightening in regard to the position which was maintained by him on behalf of the defendant on his visit to Weyburn in May, 1915. He appears at that time to have been migrating with his family to Calgary, and was asked by the defendant and other purchasers to stop off at Weyburn on the way out and investigate the situation. He says that he saw Bowman and told him that the people whom he represented were dissatisfied; that this dissatisfaction was based upon two principal grounds, viz., the fact that factories had not gone up and that the railway and station were not completed and in operation as promised; and that, on these grounds, those whom he represented were considering repudiation of their contracts, the ground for repudiation being that they had been led into buying through his promises on these points.

It thus appears that any notice of repudiation, if given by him, was of a very vague and intangible character, and also that it was based on the fact that expectations put forward at the time of the original purchase had not been fulfilled. I do not find that any claim based on actual misrepresentations of existing facts was ever clearly put forward until this action was instituted; even if it were otherwise, such representations as to future occurrences do not, in my opinion, form a ground for refusing specific performance or for granting a rescission unless they carry with them by implication a misstatement of an existing fact.

I proceed to deal in order with these alleged misrepresentations as they are set forth in paragraph 3 of the statement of defence.

Paragraph 3 alleges that it was represented to the defendant by the agents of the plaintiff:—

“(a) That the Grand Trunk Pacific Railway Company had purchased a portion of the lands belonging to the plaintiff company

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and known as the Grand Trunk Place subdivision in the said City of Weyburn, and that the said Grand Trunk Pacific Railway Company was locating its permanent station upon the said lots purchased by the said railway company from the plaintiff company."

I find as a fact that, at the time of the negotiation of the agreement in question, the right of way agent of the Grand Trunk Pacific Railway had in fact purchased a considerable portion of the right of way to the City of Weyburn, and that the right of way agent had, in May, 1912, given the plaintiff to understand that his company would locate its station at the point where it was subsequently located, and would acquire for that purpose the necessary lands.

I find further that in August, 1912, a written agreement to the above effect was made between the plaintiff company and the Grand Trunk Pacific Railway Company, and that the railway was built into Weyburn as contemplated. I am unable to find upon the evidence that the representations made to the defendant in this regard went further than the actual facts. I find that the railway was built into Weyburn as contemplated, though it did not reach there as soon as was expected, and I also find that the station was erected by the Grand Trunk Pacific Railway Company at the place originally designated as the place where the station was to be. Some contention was raised as to whether the building which was erected was a permanent station; but, while the evidence indicated that the station erected was not of an elaborate character, I am of opinion that the building that was in fact erected was built for a station and nothing else, and that the station was permanently located at the point where it was erected. I find that the representation set forth in paragraph 3 (a) was true in substance and in fact.

Paragraph 3(b) alleges that it was represented to the defendant "that the said lands which the plaintiff company proposed to sell to the defendant were within a few minutes walk of the centre of the City of Weyburn and estimated at about five-eighths of a mile."

The evidence, according to my recollection, shews that from the centre of the City of Weyburn it would take 15 to 20 minutes to walk to the lands in question; I am wholly unable to say that

15 or 20 minutes is not a few minutes. I therefore find that the representation contained in paragraph 3(b) does not constitute a misrepresentation.

Paragraphs 3(c) and 3(d) are as follows:—

(c) That a furniture factory was going to be built on a portion of the said subdivision in the following spring.

(d) That the Dominion Odic Electric Company had bricks on the ground and were about to build a large factory on a portion of the lands in the Grand Trunk Place subdivision, and that they would employ a great number of hands.

With respect to these two paragraphs I prefer the evidence given at the trial on the part of the plaintiff to that given on behalf of the defendant. My conclusion upon the whole evidence is, that neither of these two matters was present in the minds of either party at the time when the negotiations took place and the contract in question was made, and that at that time they had in fact not yet arisen. I therefore find that no representations such as are alleged were made at the time when the contract was negotiated. I think that in this respect the recollection of the defendant has become confused.

Paragraph 3(e) is as follows:—

“(e) That there was grading being done along and beside the said lots, which were to be used for wholesale industrial houses, and that the said station, factories, and warehouses would be built and completed within a six months’ period at the latest.”

With respect to this representation I find that the City of Weyburn had purchased a row of lots, part of this subdivision, for the purposes of stimulating and facilitating industrial and mercantile development in the city, and that such representations as were made on behalf of the plaintiff in respect to that matter were true in substance and in fact.

With respect to paragraph (f), “that the said property would shortly be greatly enhanced in value by reason of the different works above referred to being carried out and completed,” I find that this is mere commendation forming no basis either for refusing specific performance or for granting a rescission of the contract to the defendant. I refer in this connection to the judgment of Mowat, V.-C., in the case of *McRae v. Froom* (1870), 17 Gr. 357.

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It only remains to deal with paragraph 3(g), which is as follows:—

“The plaintiff also agreed and contracted with the defendant, before he entered into the said agreement, and as an inducement to have him sign the said agreement, that it would resell for the defendant, at an increased price, within six months from the date of the agreement or some time in the following spring, the lots which the plaintiff proposed to sell to the defendant, and that there would be no further payment or payments to be made by the defendant upon the alleged agreement and no further demand for payment of any sum or sums whatever made by the plaintiff upon the defendant.”

In the evidence given at the trial this allegation was supported and supplemented by the statement of the defendant that the plaintiff's agent, in negotiating the purchase, informed him that he would not have to put up any money, that the lots would be sold within the period which would elapse before the first payment fell due, and that, if the Grand Trunk Pacific Railway was not there within six months, the note and everything else would be handed back to him and the sale called off.

The defendant's statements are on this point directly contradicted by the witnesses for the plaintiff, George M. Bowman and James J. Griffin, also by Melvin Gayman, of St. Catharines, who was present when the bargain was made.

Taking the evidence of these three witnesses and coupling it with the indications afforded by the written correspondence, I conclude as a matter of fact that, while the subject of reselling was, no doubt, discussed, yet there was not in fact attached to the contract any condition or warranty of the nature set forth in subparagraph (g). I have little doubt that the statements made by Bowman and Griffin, the agents of the company in promoting the sale, were by no means so colourless as their evidence would now seek to have the Court infer, but I am quite unable to find the basis necessary to refuse specific performance or grant a rescission of the contract.

This allegation may also be treated from another standpoint. If the representations are put forward as forming a condition subsequent, providing for the discharge of the contract, I think such parol representations would constitute a material term

inconsistent with the written terms of the contract; and, as the contract is required by the Statute of Frauds to be in writing, parol evidence of such inconsistent term would be inadmissible: *Bailey v. Woolstone Bros.* (1907), 42 L.J. (Magazine) 457; *Knight v. Barber* (1846), 16 M. & W. 66; *Carroll v. Provincial Natural Gas and Fuel Co. of Ontario* (1896), 26 S.C.R. 181.

In case the whole field is not fully covered by what I have said above, I should add generally that, in so far as the representations which were made were matters of fact, I find that they were true; in so far as they were representations that certain events would happen in the future, I find that the plaintiff company and its officers and agents believed the representations made to be true and had reasonable ground for such belief.

I cannot better express what I understand to be the law covering this question than by quoting from Anson on Contracts, 14th ed., p. 204, where, in discussing the formation of contract and the effect of misrepresentations, he says:—

“The representation must be a representation of fact. A mere expression of opinion, which turns out to be unfounded, will not invalidate a contract. There is a wide difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it. The first is an opinion which the buyer may adopt if he will: the second is an assertion of fact which, if false to the knowledge of the seller, is also fraudulent.

“Again, we must distinguish a representation that a thing is from a promise that a thing shall be: neither a statement of intention nor a promise can be regarded as a statement of fact except in so far as a man may knowingly misrepresent the state of his own mind.”

For these reasons, I am of opinion that the defence of the defendant based on alleged misrepresentations fails.

The result is that the action is dismissed on the first ground, the defence raised in regard to misrepresentation is disallowed, and the action will be dismissed and the counterclaim allowed with such costs as are applicable to the first defence.

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[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.]

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FLORENCE MINING CO. LIMITED v. COBALT LAKE MINING CO.  
LIMITED.*Mines and Minerals—Mining Claim—Discovery of Minerals—Lands withdrawn from Exploration—Order in Council.*

The lands under the waters of Cobalt Lake having been by order in council of the 14th August, 1905, withdrawn from exploration for mines and minerals and from sale, lease, or location, it was *held*, that the plaintiffs had failed to establish their title to a mining claim based upon a discovery of minerals said to have been made upon those lands on the 7th March, 1906. The judgment of the Court of Appeal, 18 O.L.R. 275, affirmed.

AN appeal by the plaintiffs from the judgment of the Court of Appeal for Ontario (1909), 18 O.L.R. 275.

The appeal was heard by LORDS MACNAGHTEN, ATKINSON, COLLINS, and SHAW.

*J. M. Clark*, K.C., and *Atkin*, K.C., for the appellants.

*Sir R. Finlay*, K.C., and *Britton Osler*, for the defendants, respondents.

March 18, 1910. The judgment of the Board was delivered by LORD COLLINS:—This is an appeal from the decision of the Court of Appeal for Ontario affirming the judgment of Riddell, J., dismissing a claim by the plaintiff company, as assignees of one W.J. Green, to be entitled to certain lands and minerals situate under the waters of Cobalt Lake, in the Province of Ontario, and constituting claim J.S. 71, containing about 20 acres, which claim was alleged to have been discovered by W. J. Green and duly staked out as a mining claim in accordance with the Mines Act and regulations passed thereunder. The plaintiffs' case is that, notwithstanding the existence of the said claim, the Crown assumed to sell and grant to the defendant company the lands described in certain letters patent, including therein the portion embraced in the said mining claim J.S. 71; that such sale was made without any legislative authority, and the letters patent were issued erroneously and by mistake and improvidently and are utterly void as against the plaintiffs; and they claim a declaration that the said letters patent are utterly void as against them and



that they are entitled to the lands and minerals, and that the defendants' rights, if any, are subject to the plaintiffs' said rights, and they claim an injunction against extracting or removing ore or minerals, or interfering with the plaintiffs' exclusive right of possession; an account; and further or other relief.

Riddell, J., dismissed the plaintiffs' claim with costs.

The plaintiffs in this case are met *in limine* by a very great difficulty. They have completely failed to establish their claim to have made a discovery within the provisions of the Mines Act to the satisfaction of the officer charged with the duty of seeing that the regulations are duly observed.

By an order in council duly made and approved by the proper authority on the 14th August, 1905, certain land in the Nipissing District and also the lakes known as Cobalt and Kerr Lakes, situate in the township of Coleman, were withdrawn from exploration for mines and minerals and from sale, lease, or location.

It was not until the 7th March, 1906, that W. J. Green obtained a miner's license, and at 4 p.m. on that evening he claimed to have made a discovery of minerals situate in place under the waters of Cobalt Lake. As already pointed out, Cobalt Lake had been withdrawn from exploration for mining purposes by the order in council of the 14th August, 1905; nor did the subsequent orders in council of the 28th August, 1905, and the 30th October, 1905, as pointed out by the Chief Justice, at p. 288 of the report in 18 O.L.R., indicate any intention to supersede the former order withdrawing the Cobalt Lake from exploration for mines and minerals. He also points out the failure on the part of Green and his agent to take steps to have the inspector present when they withdrew a sample of ore from the drill, and the careless manner in which the claim was staked out by poles driven into the ice, which necessarily disappeared on the breaking up of the ice.

The trial Judge describes this process, which was intended to secure an accurate record of physical landmarks indicative of the site, by stating that "a survey was at once had, and staking after a fashion made." The officials refused to recognise or record Green's claim, on the ground that they had been instructed to ignore it, because the Cobalt Lake had been withdrawn from exploration by the order in council of the 14th August, 1905.

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The letters patent for the site issued to the defendant company were confirmed by an Act of the Ontario Legislature, which both the Courts below regarded as within their jurisdiction and otherwise unimpeachable.

As the plaintiffs have failed to establish their own title, it becomes unnecessary to consider this point, but their Lordships see no reason to differ from the conclusion of the Courts below.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed with costs.

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Sept. 18.

[MIDDLETON, J.]

RE HARRIS.

*Will—Direction for Sale of Property to Person Named—Security for Payment of Price—Executors—Vendor's Lien.*

A testator by his will directed that his business should be sold and that his brother should "have the privilege of first purchasing the same;" in the event of his purchasing, the stock was to be sold to him at invoice prices, he was to receive the fittings and fixtures free of charge, was to have a year to pay the price, and was to pay a fixed monthly rental for the business premises for one year; after the expiration of the year, the rental was to be fixed by the executors. By a codicil, the testator directed that the purchase-price should be paid in monthly or quarterly instalments, and the whole should be paid within one year from the date of the purchase. The brother elected to purchase upon the terms stated in the will:—

*Held*, that the executors were entitled to the security of a vendor's lien, and that the purchaser was entitled to take only subject to that lien.

THOMAS MARTIN HARRIS, by his will dated the 25th June, 1918, devised and bequeathed to his executors and trustees all his estate, both real and personal, upon the following among other trusts:—

9. "I direct that after my death my business of wholesale tobacconist now being carried on by me in York street, Toronto, shall be sold, and I further direct that my brother Edward J. Harris, who is now employed by me, shall have the privilege of first purchasing the same, and if he shall so purchase the same the stock shall be sold to him at invoice prices and he shall receive the fittings and fixtures free of charge. Further, in the event of his purchasing the same he shall have one year in which to pay for the same; and further, in the event of his purchasing the said

business, he shall pay a monthly rental of \$55 per month for a period of one year, provided my executors shall not have sold the said building during the said year; after the expiration of the said year the rental shall then be fixed by my executors. My said brother Edward J. Harris shall within 20 days after my death decide whether he will purchase the said business or not, and on the 20th day after my death or within that time he shall notify my executors in writing of his intention to purchase the said business under the above mentioned terms. In the event of my executors at the expiration of 20 days after my death not receiving the above notice in writing they shall be at liberty to sell the said business in such manner and at such price as they deem best."

By a codicil to his will, executed on the 5th July, 1918, he further directed:—

"In the event of my brother Edward J. Harris purchasing my business of wholesale tobacconist as provided under clause 9 of my said will, and wherein I have provided that he shall have one year to complete and pay the purchase-price of the same, I direct that the said purchase-price shall be paid in monthly or quarterly instalments, whichever of these two periods my executors shall deem proper, the whole of the said purchase-price to be fully paid and completed within one year from the date of the purchase of the said business."

Within 20 days of the death of the testator, Edward J. Harris served notice in writing upon the executors that he would purchase the business "under the above mentioned terms." One of the executors demanded security for the payment of the price of the goods sold; and Edward J. Harris thereupon applied to the Court, upon an originating notice, for an order determining the following question:—

"Whether Edward J. Harris was not entitled under the will, and particularly under paragraph 9 thereof, and the codicil thereto, to take over and purchase the business, including stock in trade and fixtures, of the late Thomas Martin Harris, without the necessity of furnishing other security therefor."

September 12. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

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*F. J. Hughes*, for the applicant. There should be no security, the testator's evident intention being that the sale should be put through without security. The purchaser was to be given credit; and, inasmuch as a year's time was given to him to pay for the business, it could not have been intended that he should give security.

*G. G. S. Lindsey*, K.C., for Mary Harris, the executrix and a beneficiary. Although all the testator's property was conveyed to his trustees to sell, in the case of the tobacco business the testator made the bargain, sold the goods, and gave time to the purchaser, Edward J. Harris, to pay for them; but the fact that the testator directed that the goods should remain in his York street warehouse shewed that he did not intend possession to pass. That was equivalent to his saying that the goods should not be removed until payment: *Dodsley v. Varley* (1840), 12 A. & E. 632. The vendors would have an equitable lien for the unpaid purchase-money. A vendor's lien arises when the property sold consists of chattels: Halsbury's Laws of England, vol. 19, para. 22. The fact that the purchase-money is payable by instalments does not deprive a vendor of his lien: *Nives v. Nives* (1880), 15 Ch. D. 649.

*W. K. Murphy*, for the Toronto General Trusts Corporation, co-executor. The testator, if he had intended the purchaser to have the goods without security, would have said so in his will.

*F. W. Harcourt*, K.C., Official Guardian, for the infants, contended that the vendors should have a lien for unpaid purchase-money.

September 18. MIDDLETON, J.:—Declare that the executors are entitled to a vendor's lien upon the property to be sold to Edward J. Harris, and that he is, upon exercising his option to buy, entitled to take only subject to that lien. This declaration does not exclude any arrangement satisfactory to the executors. Costs out of the estate.

## [APPELLATE DIVISION.]

FRANCIS V. ALLAN.

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Dec. 26.

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April 3.

*Contract—Claim against Estate of Uncle of Plaintiff—Promise to Provide for Plaintiff—Consideration—Unenforceable Agreement—Death of Uncle—Omission to Provide for Plaintiff in Will—Promise of Principal Legatee under Will to Pay Plaintiff Sum of Money—Evidence—Promise not made in Settlement of Doubtful Claim—Enforcement of Moral Obligation—Claim upon Promissory Notes Made by Testator—Interest—Costs—Appeal.*

The plaintiff alleged that her uncle promised her that if she and her mother would give up a project which they had of "keeping roomers" in order to support themselves, and if she "would continue on where she was and look after her mother and keep her he would provide for her as long as she lived," and to this arrangement she consented; that the promise made by her uncle was that he would pay her \$50 every 4 months during his and her lifetime and would leave her by will a sum sufficient to produce the same income during her lifetime; that this agreement was carried out on her part; that her uncle, in pursuance of the agreement, gave her three promissory notes amounting to \$1,150; and that shortly before his death, he told her that besides these notes he had left her \$2,000 by his will. After his death it was found that he had left her nothing by his will, but had left the bulk of his property to his son, and had made the son one of the executors of his will. The plaintiff told the son what the testator had done and said, and the son promised to pay the plaintiff \$3,000, but afterwards withdrew his promise. The plaintiff claimed \$3,000 from the son, or, in the alternative, the amount due upon the promissory notes plus \$2,000 from the executors:—

*Held*, that the alleged agreement between the plaintiff and her uncle was not enforceable.

*Held*, also, reversing on that branch of the case the judgment of KELLY, J., the trial Judge, that the son's promise was not, upon the evidence, which was all documentary, a promise made in order to settle a claim which was doubtful or believed by the parties to be doubtful; and the plaintiff's claim against the son individually failed.

A mere moral obligation to do that which the promisor agrees to do is not a valuable consideration.

The plaintiff was *held* entitled to judgment for the amount of two of the promissory notes, which were overdue, and interest thereon, and for the amount of the interest that was overdue upon the third note when the action was begun, the principal not being yet due.

The plaintiff was allowed the costs of a County Court action for the sums for which she had judgment, without set-off, and no costs were allowed to either party in respect of the claim upon which she failed or of the appeal from the judgment of the trial Judge.

ACTION by a niece of Henry W. Allan, deceased, to recover from the defendant Norman Allan, the deceased's son, the sum of \$3,000, or to recover from that defendant and his co-defendant, C. A. Smith, as executors of the will of Henry W. Allan, the amounts due in respect of certain promissory notes made by the deceased and the sum of \$2,000.

September 18, 1916. The action was tried by KELLY, J., without a jury, at a Toronto sittings.

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*G. W. Holmes and W. A. Lamport, for the plaintiff.**M. K. Cowan, K.C., and E. H. Brower, for the defendants.*

December 26, 1916. KELLY, J.:—One defence set up is that any benefits conferred upon or promised to the plaintiff by her uncle, Henry W. Allan, now deceased, were without value or consideration; while the plaintiff alleges that there was consideration, consisting of her and her mother giving up, at her uncle's request, the project she says they had in contemplation of starting a rooming-house. There is in a letter written by the uncle to the plaintiff an expression of his view that her mother—his sister—had done sufficient work in her lifetime to be entitled to immunity from further work. That, no doubt, was his opinion, expressed with a feeling of kindness which could be expected to be shewn by one member of a family towards another where the relationship is one of affection, such as evidently existed between Mr. Allan and the plaintiff's mother.

After a careful consideration of the whole situation as revealed in the evidence, and with special reference to what is said to shew a giving-up, in consideration of a benefit agreed to be conferred by Mr. Allan, of a project to enter upon the business of keeping rooms, and which the plaintiff points to as a changing of her position, I am clearly of opinion that what did happen in that respect between the parties fell short of amounting to an agreement legally enforceable by the plaintiff. The uncle had made payments and contemplated continuing to make payments to his niece, the plaintiff, and voluntarily promised to do so. When the condition of his finances—as it is sworn he said—rendered it difficult for him to make payments in cash, he gave promissory notes, bearing interest, for \$100 and \$50 respectively, following these with a further benefit in the form of another promissory note for \$1,000, not yet on its face due, and also bearing interest payable half-yearly.

So matters stood at the time of his death, but for the further circumstance that the plaintiff says that a few days before his death, after referring to these promissory notes, he told her he had left her an additional \$2,000 by his will, which he said would make more than \$3,000 in all.

Her conduct towards and interest in her uncle and the many



kindly acts she performed for him down to and during his last illness express towards him a regard on her part based upon affection and not on any sordid consideration. It was not the outcome of gratitude for past favours, nor was it founded on the expectation of favours to come, but was dictated by kindness and regard of the most unselfish kind.

I have no reason to doubt, and do not doubt, the plaintiff's story about her uncle's statement to her while she was with him at Gravenhurst, where he was for a short time prior to his death, which occurred on the 10th March, 1913, when he told her he had left her the additional \$2,000. I am at a loss to understand how he came to make the statement. The will, which was executed while he was at Gravenhurst, and bears date the 4th March, 1913, and which was prepared under instructions from him by Mr. Bruce, a solicitor, with a good deal of care and painstaking, not only did not give to the plaintiff the \$2,000 referred to, but revoked a provision in her favour in a former will. Mr. Bruce's evidence is that the testator was able to discuss his affairs clearly when giving the instructions for the will, and made no mention of any bequest to the plaintiff.

The plaintiff did not become aware of this until after her uncle's death, but she still relied upon his promise, and from all that appears believed that she was entitled, not only to the amount of the notes, in all \$1,150, not including accrued interest, but also to the \$2,000.

The defendant Norman Allan had not returned from Scotland at the time of his father's death, but reached Canada soon afterwards. At his request, the plaintiff gave him fully and candidly a report of what she knew of his father's affairs, and an account of what had passed between her uncle and her in reference to his benefactions and promises, supplementing her own statement with copies of important parts of the correspondence which had passed between Mr. Allan and her. It was no surprise to the defendant Norman Allan to learn that his father had done something to benefit the plaintiff, or that he had increased the amount, as the plaintiff claims he stated he had increased it. He says in his letter to her of the 24th November, 1913, more than 8 months after his father's death, that he understood from conversations he had had with his father that he intended to give the plaintiff about

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\$1,500 in the form of promissory notes payable after his death, on which she would receive interest during his lifetime—and he adds: “I can very easily conceive that he probably increased this in his mind before his death.” So far was he convinced of the plaintiff’s position that he told her—in writing—“You can take it as settled and I undertake that you shall receive \$3,000, inclusive of the promissory notes he gave you.” Observing from a letter of his father to the plaintiff that the former intended that payment of the \$1,000 note should be made within one year from his death, he then suggested that it would be satisfactory for him to make that condition apply to the whole amount. The plaintiff acceded to the whole proposal, by which she was to receive \$3,000, instead of the claims which she honestly believed she was entitled to. At that time the total of what she believed was coming to her, even excluding the \$100 note and the \$50 note, exceeded \$3,000, there being then interest accrued and unpaid on this latter note, which brought its face value considerably over \$1,000, and she believed she was entitled as well to the \$2,000. But she had claimed the two smaller notes as well, and I think honestly believed that she was entitled to them. The defendant Norman Allan agreed to settle for \$3,000 all the items of the claim, including all these promissory notes, his understanding then being, as expressed in his letter, that she had promissory notes totalling \$1,150.

Nothing in the way of objection to or dissatisfaction with this settlement is heard for 14 months, and in the interval, namely, in May, 1914, payment is made to the plaintiff by the executors of \$102.18. On the 7th January, 1915, without any previous hint at dissatisfaction, the defendant Norman Allan wrote the plaintiff, assuming to repudiate the compromise he had made with her in November, 1913, and by laboured special pleading endeavoured to reason out that his father had not rendered himself liable to the plaintiff in the manner or to the extent she believed he had made himself liable. The time had gone by, however, for repudiation. He had deliberately made his agreement with the plaintiff in November, 1913, by which he offered her and she accepted, in settlement of her claim, honestly believed in, a sum less than the amount of such claim, on different terms of payment: a claim which he, knowing his father’s disposition towards and intentions regarding the plaintiff, at least believed was a doubtful one, if, indeed,

he did not believe it was enforceable to the full extent claimed by the plaintiff. I say "deliberately made" because, as early as the 25th March, 1913, the plaintiff gave him freely and fully all the information he desired from her about his father's affairs.

He is an executor of his father's will, and on the 26th April, 1913, with his co-executor, obtained probate. It would be difficult to arrive at the conclusion that a compromise made 7 months after he had assumed the duties of executor and 8 months after he had learned from the plaintiff the facts as she knew them, was hastily made. The circumstances leave no room for doubt that there was ample time for consideration and that the agreement of the 13th November was made deliberately and with full knowledge of the facts. I fail to see what effect can be given to this statement taken from his letter of the 7th January, 1915, the first hint given to the plaintiff of his attempt at repudiation: "Recently this whole question has been given much thought by me and the other executor, and we have concluded that my letters were written without the proper digest and perspective and careful consideration which we are now giving the matter. The view now arrived at is different." Later in this letter he says: "Upon this further and careful consideration from every view-point, I believe that Father had no intention beyond that you should receive the sum of one thousand dollars (\$1,000)." It is not possible to understand why he should take this position in the face of the statement in his letter of the 24th November, 1913, that in conversations with his father he was given to understand that he intended to give the plaintiff more than the \$1,000. This letter, a belated attempt to repudiate the obligation which he had incurred 14 months previously, can have no effect unless it is held that a contract solemnly entered into can successfully be repudiated by a party thereto as it suits his whim or convenience.

For the proposition that a compromise of a disputed claim honestly made constitutes valuable consideration, even if the claim ultimately turns out to be unfounded, there is sufficient authority. It is not even necessary that the question in dispute should be really doubtful, it being sufficient that the parties in good faith believe it to be so, though such belief is founded on a misapprehension of a clear rule of law. This statement of the law is made in volume 7 of Halsbury's Laws of England, p. 387, para. 801, and cases are cited to support the proposition.

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In *Cook v. Wright* (1861), 1 B. & S. 559, it was held that the compromise of a claim may be a good consideration for a promise, although litigation has not been actually commenced.

From all that appears in the evidence, while, as I have already said, the plaintiff believed in the validity of her claim for an amount in excess of that promised by the defendant Norman Allan, the inference is that she would have insisted on its being settled; and there was, in my opinion, quite sufficient evidence on which a jury could find, and which entitles me to find, that what really was meant by the defendant Allan's proposal was that if the plaintiff would accept \$3,000 payable in the manner he proposed, instead of the full amount she claimed, he was prepared to bind himself, and did bind himself, to make such payment.

Apart from the question of consideration arising from acceptance of a settlement less advantageous than her original claim, a further question presents itself, that of forbearance. Forbearance by one party, at the request, express or implied, of another, constitutes good consideration; and, while I find no evidence of an express request here, the defendant Allan's promise cannot be accounted for unless on either one or both of the two considerations—the plaintiff's acceptance of less than she believed she was entitled to or the putting her mind at rest so as to stay her hand in the prosecution of her claim against her uncle's estate, in the hands of the defendants as executors. On the question of such promises reference is made to *Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449; *Ockford v. Barelli* (1871), 20 W.R. 116; *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266. A later case is *Holworthy Urban District Council v. Rural District Council of Holworthy*, [1907] 2 Ch. 62, in which, at p. 73, it is said: "It is no ground for setting aside a compromise that the claims or one of the claims, made by one of the parties, was not well-founded in law, provided that it was put forward *bonâ fide*."

In the present case the compromise and agreement, in my opinion, would fall within the application of the law as expressed by these authorities.

The plaintiff is entitled to succeed against the defendant Norman Allan for the sum of \$3,000, and interest from the 24th November, 1914, subject to a credit of the \$102.18 paid to her in 1914. Judgment will be against the defendant Norman Allan accordingly,

with costs, and dismissing the action against the executors without costs.

The defendant Norman Allan appealed from the judgment of KELLY, J.; and the plaintiff cross-appealed.

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January 26, 1917. The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*M. K. Cowan*, K.C., and *A. G. Ross*, for the defendant Norman Allan, appellant, and for Smith, the co-defendant.

*G. W. Holmes* and *W.A. Lamport*, for the plaintiff, respondent and cross-appellant.

April 3, 1917. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendant Allan from the judgment dated the 26th December, 1916, which was directed to be entered by Kelly, J., after the trial of the action before him sitting without a jury at Toronto on the previous 18th September; and there is a cross-appeal by the plaintiff from the same judgment.

The respondent is a niece of the late Henry W. Allan, and the appellant and his co-defendant, C. A. Smith, are the executors of the will of the deceased.

The case made by the respondent in her pleadings is that "in, about, and during the years 1908-9" she informed her uncle that, on account of family changes then in contemplation and for other reasons, she and her mother would be obliged to take in boarders or "keep roomers" in order to keep themselves, and that the testator, not desiring that they should do this, promised the respondent that if she would refrain from doing it and "would continue on where she was and look after her mother and keep her he would provide for her as long as she lived," and to this arrangement she consented; that the promise and agreement made by the testator to the respondent was that he would pay her \$50 every 4 months during his and her lifetime and would leave her by will a sum sufficient to produce the "same income during her lifetime;" that this agreement was carried out on her part; that the testator, in pursuance of the agreement, gave her three promissory notes

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amounting to \$1,150, and that shortly before his death he told her that besides these notes he had left her \$2,000 by his will; that the testator, being desirous of making changes in his will as respected his sons, made a new will in which the provision in his former will was left out; that this happened on account of his failing memory, extreme pain and mental worry, the testator when he made the new will being on his death-bed, or that it happened because the draftsman of the will had "forgotten or omitted his instructions;" that the respondent and the appellant, who well knew the testator's intentions, were surprised at the omission from the will of the legacy to the respondent of \$2,000; that the appellant required her to submit to him proof of the agreement and promise which the testator had made; that she did this and informed him that the total amount which the testator had given and promised to give her was \$3,150, i.e., the amount of the three promissory notes and the legacy of \$2,000; and that the appellant, recognising the necessity of carrying out such obligation of his father's estate, made on his own behalf an agreement with her "to pay her \$3,000 in settlement of her claims," the payment to be made within 12 months from the date of the testator's death; and the claim is for judgment against the appellant for \$3,000, or, in the alternative, judgment for the amount of the three promissory notes, \$1,150, and \$2,000 "upon the agreement of the said late Henry W. Allan with her," against the appellant and his co-defendant as executors of the testator's will, and interest.

The learned trial Judge's conclusion with regard to the agreement with the testator which the respondent sets up, was, that whatever happened between the parties "fell short of amounting to an agreement legally enforceable by the plaintiff." He, however, gave judgment for the respondent against the appellant for \$3,000, basing his judgment upon the finding which he made that the promise to pay that sum which the respondent alleged that the appellant had made to her was proved, and holding that the transaction which resulted in the promise being made was a compromise of a claim which was doubtful, or believed to be doubtful, honestly made, which constituted a valuable consideration, even if the claim ultimately turned out to be unfounded.

I agree with the learned trial Judge that the alternative case made by the respondent failed, and I would agree entirely with the



disposition he made of the case if I thought that the promise of the appellant was a promise made in order to settle a claim made by the respondent which was doubtful or believed by the parties to be doubtful, even though it was in fact a claim that could not be enforced.

I am unable, however, to see how the conclusion can properly be reached that the appellant's promise was of that character.

The evidence on this branch of this case is all documentary, and consists of correspondence between the respondent and the appellant. Nowhere in the correspondence is any claim enforceable against the estate of the testator put forward beyond the claim on the three promissory notes, and any claim beyond that was put forward, if as a claim at all, only as being a moral obligation resting on the appellant as the possessor of the bulk of his father's estate to make good the expectations of the respondent based upon what she testified the testator had told her as to the provision for her that he had made by his will.

The correspondence begins with a letter from the respondent to the appellant of the 21st March, 1913, in which she tells him that she is surprised that his father did not mention her name in his will; that on his death-bed he asked her about the promissory notes she held, and that she told him "what amounts, and he said, 'I have left you \$2,000 in my will, and with the notes that will give you a little over three thousand;' " and that she thanked him for his kindness, and she adds, "I am confident that he thought that he had done so." The next letter is from the respondent to the appellant. It is dated the 25th March, 1913, and except in a postscript deals altogether with other matters: the postscript says: "You ask for list of notes and statement so I am sending extracts from letters and you can read for yourself;" and these accompanied the letter.

On the 24th November, 1913, the appellant wrote to the respondent the letter which has been held to contain the promise which by the judgment the appellant is compelled to implement. The appellant begins by saying: "I have now decided to write to you definitely telling you what I have decided on financially concerning you;" and he then tells her that from his conversations with his father he gave him to understand that he intended to give her about \$1,500 in all, and that his father suggested that

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he was going to give it to her in the form of promissory notes, on which she "would receive interest during his lifetime which would be payable after his death," and he concluded his letter by saying: "The extracts from his letters on the whole tend to bear this out. I can, however, very easily conceive that he probably increased this in his mind before his death, and it gives me the greatest pleasure in the world to accept your word that he desired to make it \$3,000 in all for you. Therefore you can take it as settled that you shall receive \$3,000 inclusive of the promissory notes."

To this letter the respondent replied on the 9th December, 1913. She begins by saying: "I received your letter telling me that you were to allow me \$3,000 inclusive of notes which I hold. I sincerely thank you. . . ."

These letters shew very clearly, I think, that the respondent was not putting forward any claim in respect of the \$2,000 except at the most one based upon the idea that it was the moral duty of the appellant to carry out what had been the intention of the testator and in effect a claim upon the bounty of the appellant.

Her letter of the 21st March, 1913, shews, I think, that she recognised that she had no claim in respect of the \$2,000 that she could enforce, and that her attitude was one of disappointment that the will did not include a legacy to her of that amount; and the appeal to the respondent, which the letter was intended to make, was an appeal to his generosity or perhaps to his moral sense.

His reply of the 24th November, 1913, shews clearly, too, that he had no idea that he was making a compromise of a claim put forward by the respondent against his father's estate, and that what he was undertaking to do was making a provision that he was under no obligation to make, but was making it in order to carry out what the respondent had satisfied him that the testator had intended to do for her by way of bounty.

That this was the respondent's understanding of the matter is shewn by her letter of the 9th December, thanking the appellant for telling her that he was to *allow* her \$3,000 inclusive of the notes which she held.

The respondent's letter to the appellant of the 13th January, 1915, in answer to his, withdrawing the promise he had given, supports this view. In that letter she tells him that he did not

make the promise until he had satisfied himself, from what his father had told him and others, and also from extracts from his father's letters which she had sent him, that he intended leaving her something.

We are not called upon to consider whether there was any moral justification for the appellant's withdrawal of his promise. The only question we have to determine is, whether or not the appellant can be compelled by law to fulfil it; and I am of opinion, for the reasons I have given, that he cannot. The only ground suggested upon which the appellant could be compelled to perform his promise is that upon which my brother Kelly based his judgment; and, that ground being found, as, in my opinion, it should be found, untenable, it follows that the principal claim put forward by the respondent fails, and that her action in respect of it must be dismissed.

A mere moral obligation to do that which the promisor agrees to do is not a valuable consideration. The law as to this is thus stated in Halsbury's Laws of England, vol. 7, p. 386, para. 799: "But a mere motive, such as the moral obligation to repay a benefit already received, or to make provision for a mistress seduced by the promisor on an agreement to sever the connection and live apart, or the desire of an executor to carry out the wishes of his testator, is not valuable consideration; nor is natural love and affection arising from blood relationship between the parties."

See also Halsbury's Laws of England, vol. 7, p. 388, note (*h*).

There remains to be considered the claim that the respondent is entitled to recover the amount of the two overdue notes and the overdue interest on the \$1,000 note, the principal of which is not yet payable. The notes for \$50 and \$100 were overdue when the action was begun, and some interest on the \$1,000 note was also then overdue, and the respondent is entitled to judgment for the amount of the two overdue notes with interest and for the amount of the interest that was overdue on the \$1,000 note on the 16th September, 1915, when the action was begun.

It was argued that the testator gave the \$1,000 note in satisfaction of the other two notes, except the interest upon them, but it is by no means clear that, if that was his intention, it was clearly expressed in his letter of the 1st October, 1912, sending the

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\$1,000 note to the respondent. This the testator recognised in his letter to the respondent of the 25th December, 1912, and he in that letter consented to the respondent retaining the three notes as her own property.

I would therefore substitute for the judgment which has been directed to be entered, judgment for the respondent against the executors for the amount which I have said the respondent is entitled to recover, and dismiss her action as to her other claims.

I have had some difficulty as to what direction should be made as to costs, but have come to the conclusion that it is not unreasonable that the respondent should get the costs of a County Court action for the recovery of that which I think she is entitled to recover, without set-off, and that neither party should pay or receive costs in respect of the claim which has failed or of the appeal, and I would so order.

*Appeal allowed.*

[The judgment of the Appellate Division was reversed by the Supreme Court of Canada on the 15th October, 1918, and the judgment of KELLY, J., restored, with this variation, however, that the judgment for the plaintiff is to be against the defendants as executors, and not against the defendant Allan personally.]

## [APPELLATE DIVISION.]

1918

## FIELDHOUSE V. CITY OF TORONTO.

Jan. 29.  
Oct. 7.

*Municipal Corporations—Plant for Disposal of Sewage—Erection and Operation—Negligence in Operation—Nuisance to Neighbours—Offensive Odours—Special Damage—Statutory Authority—Municipal Act, sec. 398 (7)—Absence of By-law—Non-compliance with secs. 94 and 97 of Public Health Act—Approval of Provincial Board of Health—Compensation under sec. 325 (1) of the Municipal Act—Remedy by Arbitration—Damage Caused by Lawful Exercise of Powers—Recovery in Action along with Damage Caused by Negligence in Operation.*

If the thing complained of, although an act which would otherwise be actionable, be authorised by statute, no action will lie in respect of it; but, if it be not the very thing authorised by the Legislature, an action will lie.

Review of the authorities.

Section 398 of the Municipal Act, R.S.O. 1914, ch. 192, provides that by-laws may be passed by the councils of all municipalities (7) for establishing works for the interception or purification of sewage, and making all necessary connections therewith, and acquiring land in or adjacent to the municipality for any such purposes; and sec. 94 of the Public Health Act, R.S.O. 1914, ch. 218, provides that whenever the construction of a system of sewerage is contemplated by the council of any municipality, the council shall first submit the plans and specifications of the work to the provincial board of health for its approval; that the board shall inquire into and report upon the system; and that the construction of the system shall not be proceeded with until reported upon and approved by the board:—

*Held*, that the defendants, a city corporation, had created a nuisance by the establishment and operation of a sewage plant, causing offensive odours, by which the lands of the plaintiffs in the vicinity were injuriously affected, and by reason of which the plaintiffs and their families suffered in health; that it had not been shewn that a by-law was passed by the defendants' council authorising the installation of the plant; that the work came under the provisions of sec. 94 of the Public Health Act, and it had not been shewn that those provisions had been complied with, nor (*per* HODGINS, J. A.) the provisions of sec. 97; that the damages suffered by the plaintiffs were caused by the defendants' negligence; and that the defendants could not, therefore, rely upon statutory authority justifying the acts complained of.

Judgment of MULOCK, C. J. Ex., affirmed.

*Per* CLUTE, J.:—Although sec. 325 (1) of the Municipal Act expressly provides that where land is injuriously affected by the exercise of any of the powers of the corporation under the authority of the Act the corporation shall make due compensation for the damages necessarily resulting therefrom, and that the amount of compensation *shall* be determined by arbitration, yet where the major part of the damage arises from negligence in the operation of the plant, and it seems impossible to assign any particular portion of the injury to the lawful exercise of the powers given, the plaintiff is not precluded from recovering full compensation in the action which he is compelled to bring in order to seek an adequate remedy.

THIS was an action to restrain the defendants, the Corporation of the City of Toronto, from maintaining a nuisance and for damages.

The defences were denial of the nuisance and statutory authority to do what was complained of.

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At the opening of the case the plaintiffs Martin and Fazackerley were added as co-plaintiffs.

The action was tried by MULOCK, C.J. Ex., without a jury, at a Toronto sittings.

*T. R. Ferguson and J. C. Thompson*, for the plaintiffs.

*George Wilkie and Irving S. Fairty*, for the defendants.

January 29. MULOCK, C.J. Ex.:—The circumstances giving rise to the plaintiffs' complaints are as follows:—

The defendants, in professed exercise of the powers conferred on municipal corporations by the Municipal Act, established a sewage disposal plant in the vicinity of Ashbridge's Bay, within the city limits, and the plaintiffs contend that the plant when in operation has given off odours so offensive as to injure the properties of the plaintiffs Fieldhouse and Fazackerley, to interfere with the reasonable enjoyment of the properties of the plaintiffs, and to be injurious to the health of themselves and of their families.

The following is a brief description of the plant and of its operation:—

Trunk sewers convey large quantities of sewage to the plant. This sewage first passes through screens, which intercept solids too large to pass through the meshes of the screens, and these solids are then thrown out on the ground in heaps and are intended to be covered with chloride of lime, hay and shavings, in order to prevent offensive odours escaping. The sewage then passes into large settling tanks, where much faecal matter settles to the bottom of the tanks. This concentrated sewage is called "sludge," and each night this sludge, by the opening of valves in the bottom of these tanks, flows by gravitation through a pipe into a settling area. In all, the defendants have about 19 acres for settling areas, and this acreage is divided by piles into areas 80 feet by 250 feet in size and about 5 or 6 feet in depth. The acreage was part of Ashbridge's Bay; and, after the piling was completed, each area remained full of water. The pipe carrying the sludge into the area discharges it under water until the area is nearly full of sludge. Then the mouth of the pipe is suspended above the surface, and the sludge falls into the area. The process of filling an area occupies about 4 or 5 weeks. During that period, for about 5 hours each



night, sludge at the rate of 1,000 gallons a minute is discharged with considerable force into the area. During this discharge the contents of the area are in a violent state of agitation, "boiling" up to the surface and giving off offensive odours. The sludge entering the area causes the water in it to overflow into the adjoining area, and such overflowing continues for about 4 or 5 weeks. By this time the contents of the area being full of the sludge, the sludge becomes semi-fluid. Then it is covered more or less effectually with chloride of lime, hay, shavings, etc., in order to prevent the escape of offensive odours; but, notwithstanding these measures, the mass for 3 or 4 months continues to give off odours.

When one area is thus filled, the sludge in like manner is discharged into the area which has already received the overflow. It was said that a scum would form on such second area, and that it assists in preventing the escape of gases whilst the area is being filled with sludge. But this scum is a very ineffective preventive to gases escaping. At times the wind breaks up the scum and drives it to the side; heavy rains also cause it to sink. Such conditions must have always been more or less present. As one area becomes filled, the sludge is discharged into another area; the filling never ceasing.

I now return to trace the effluent of the sewage from the settling tanks. In order to take care of it, an outfall pipe was laid from the plant across the marsh to Lake Ontario, a distance of about one mile. This outfall pipe, except in cases of emergency, was expected to take care of all the effluent from the tanks, but it is of insufficient capacity, and in consequence much of it passes by what is called the storm overflow passage into Ashbridge's Bay. This storm overflow passage was intended only to meet emergencies; but, owing to the insufficient capacity of the outfall pipe, it is obliged to receive continuously a part of the normal volume of effluent; further, there are two serious breaks in the outfall pipe, and through them large quantities of sewage, instead of passing into the lake, escape into the bay, and have there deposited much faecal matter, from which offensive gases escape into the atmosphere.

The defendants contend that they have statutory authority to establish and operate the plant, and that in consequence this action will not lie. They also contend that it is being operated with reasonable care in order to prevent a nuisance, and, if such is the

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case, that they are doing all that they are required to do. They have statutory authority to establish a sewage plant, but no authority to create a nuisance by its operation; and inability to operate it without causing a nuisance does not, in my opinion, furnish an excuse for their creating a nuisance. While I am of the opinion that the operation of the plant causes a nuisance, and the absence of negligence would not furnish a defence, I think the facts shew that the nuisance is traceable largely, if not entirely, to negligence: e.g., fæcal matter called "screenings," being dumped on the surface of the ground, is at times insufficiently covered or disinfected, and in consequence offensive smells are given off. The evidence shews that when properly covered no offensive odours escape from these screenings.

Further, no serious attempt has been made to destroy or render innocuous the odours that arise nightly from the sludge being discharged into the areas. For over 5 hours each night it runs into the areas in large volume and with great force, stirring up the mass, making it boil, as witnesses describe it, and throwing off foul and sickening odours, and so polluting the atmosphere that frequently in the hot summer season people living in the neighbourhood have in consequence been unable to sleep and have been obliged to close their doors and windows, preferring the stifling air of the closed house to the foul and disgusting smell from the sewage.

Further, the break in the outfall pipe has been allowed to continue a long time without any attempt to repair it, and there has escaped in this way into the bay a steady stream of sewage at the rate of probably half a million gallons each 24 hours, and there is now in the bay a large quantity of fæcal matter, which in the course of putrefaction during the warm weather throws off sickening odours. No excuse has been given for the defendants' failure to repair this pipe. The engineers who designed this plant contemplated this pipe being maintained in efficiency; and, tested from this standpoint alone, the defendants' failure so to maintain it is an act of great negligence.

The settling tanks are frequently flushed, and during the period of flushing give off most offensive odours, but no steps appear to have been taken to carry off these odours or to render them inoffensive.

Whilst the odours complained of have their origin in these

various sources, I think the chief source is the settling areas, and no reasonable steps have been attempted in order to prevent or minimise the nuisance arising therefrom.

According to the evidence of Mr. Hatton, civil engineer, one of the defendants' witnesses, it is probable that by a comparatively inexpensive treatment the gases can be rendered harmless. Mr. Hatton has for years made a special study of the treatment of sewage, and he impressed me as a most fair-minded and capable engineer; I attach great weight to his opinion.

It is not for the Court to direct what steps the defendants should take to abate the nuisance, but I think they would be well advised if they acted upon his advice.

I find that the operation of the plant since its inception has so polluted the atmosphere with foul and offensive odours, arising from faecal matter, as to create a nuisance, especially injurious to the plaintiffs.

As to Fieldhouse, he was, and still is, the owner of two brick stores which he rents for business purposes. The odours in question have injured the rental value of the property, and in consequence he has been unable to realise therefrom as much as, but for the nuisance complained of, he would have been able to obtain. I have not the evidence before me in sufficient detail to enable me to determine the exact extent of his loss, but it amounts, I think, to at least \$600 up to the present time, and I award him damages to that extent; but, if either party is dissatisfied with that amount, he may have a reference, the costs thereof to be in the discretion of the Master.

The plaintiff Fazackerley owns a store in which he resided and carried on business, but the odours injured his business and made his wife ill, and she was unable to withstand the injurious effects of the odours. In consequence he was compelled to remove elsewhere.

The plaintiff Martin owned a house within 200 or 300 yards of the disposal beds, and his wife also became ill because of the odours, and he also was obliged to move elsewhere. Further, the odours made it difficult for him to keep his house rented, and in consequence at times it remained vacant and at others was let at reduced rates.

No evidence as to the extent of the pecuniary loss of the plain-

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tiffs Fazackerley and Martin was given, and therefore I am unable to award them pecuniary damages; but I find that the odours were so injurious as to interfere with the reasonable enjoyment of their properties.

For these reasons, my judgment is, that the defendants should be restrained by injunction from so operating their plant as to cause a nuisance to the plaintiffs; that they pay to the plaintiff Fieldhouse \$600 damages or such sum, if any, as shall be awarded by the Master in the event of a reference, and such costs as the Master in his discretion may give; the defendants to have until the 1st May, 1918, in which to abate the nuisance, with leave to them from time to time to apply for further extensions of time; the plaintiff Fieldhouse to be entitled to a reference from time to time for any further damages he may sustain during the continuance of the nuisance; costs of such reference to be in the discretion of the Master. The defendants must pay to the plaintiffs the costs of this action.

The defendants appealed from the judgment of MULOCK, C.J.Ex.

May 13 and 14. The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and CLUTE, J.

*Irving S. Fairty and C. M. Colquhoun*, for the appellants, argued that they had done all that was in their power under the circumstances of the case, and were not chargeable with negligence. The Court should tell them in what respect they had been negligent, and what possible means they could have adopted, other than those which they had adopted, in order to obviate the evil complained of. In this connection they referred to *Chadwick v. City of Toronto* (1914), 32 O.L.R. 111, 116, 117, as being a similar case to the present. The case is a very serious one for the appellants, as a great number of persons within a vast radius are in the same position as the plaintiffs. The scheme for the disposal of the city sewage was adopted by the appellants on the advice of careful and experienced engineers, and the onus lies on the plaintiffs to shew that the appellants have not done everything possible in order to prevent the trouble complained of. The appellants rely on sec. 398 (7) of the Municipal Act as giving them power to construct the

plant, and contend that the plaintiffs have no right of action except in respect of negligent operation, which they have failed to prove. Their right to compensation for injury to their land stands on a different basis and should be enforced by other means than such an action as the present. The following cases were referred to: *Metropolitan Asylum District Managers v. Hill* (1881), 6 App. Cas. 193; *Canadian Pacific R. W. Co. v. Roy*, [1902] A.C. 220; *Rickey v. City of Toronto* (1914), 30 O.L.R. 523, 19 D.L.R. 146; *Wigle v. Township of Goshfield South* (1912), 25 O.L.R. 646, 2 D.L.R. 619; which followed *West Leigh Colliery Co. v. Tunnickliffe & Hampson Limited*, [1908] A.C. 27, 29. The only remaining remedy which has been suggested, the roofing-over of the sludge, has not been tried elsewhere, and was not suggested till long after the beginning of this action.

*T. R. Ferguson*, for the plaintiffs, the respondents, argued that the appellants had not constructed their plant on the proper method and had not followed the recommendations of their own engineers. They had, moreover, failed to comply with the requirements of the Public Health Act, sec. 94 (1). They were without statutory justification for their acts, and the case must be treated as one at common law. The learned trial Judge had found that the work was done negligently, and his finding should be adopted. Counsel referred to the following cases: *Guelph Worsted Spinning Co. v. City of Guelph* (1914), 30 O.L.R. 466, 474, 476; *Cowper Essex v. Acton Local Board* (1889), 14 App. Cas. 153, *per* Lord Bramwell, at p. 170; *Beamish v. Glenn* (1916), 36 O.L.R. 10, 18, 19; *Weber v. Town of Berlin* (1904), 8 O.L.R. 302; *West v. Bristol Tramways Co.*, [1908] 2 K.B. 14; *Canadian Pacific R.W. Co. v. Parke*, [1899] A.C. 535, *per* Lord Watson, at p. 544; *Cadwell & Fleming v. Canadian Pacific R.W. Co.* (1916), 37 O.L.R. 412, 423; *Oakley v. Webb* (1916), 38 O.L.R. 151, 33 D.L.R. 35; *Cairns v. Canadian Refining Co.* (1914), 6 O.W.N. 562, 26 O.W.R. 490; *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533, 538.

*Fairty*, in reply, referred to the *Guelph* case, *supra*, 30 O.L.R. at p. 476; Beven on Negligence, Canadian ed., pp. 615, 616, where the case of *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, is discussed; *London and Brighton R.W. Co. v. Truman* (1885), 11 App. Cas. 45.

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October 7. CLUTE, J.:—Appeal from the judgment of the Chief Justice of the Exchequer, dated the 29th January, 1918.

This action is brought for damages and an injunction for the negligent installation and maintenance of a system of sewerage in the City of Toronto and the negligent, defective, and inadequate disposal of the same, whereby the plaintiffs suffered special injury.

The defendants deny that they were guilty of negligence and plead statutory authority to do what is complained of.

The facts are fully set forth in the reasons for judgment of the trial Judge.

In order to take care of the effluent of the sewage from the settling tanks, an outfall pipe was laid from the plant across the marsh to Lake Ontario, a distance of about one mile. This outfall pipe, except in case of emergency, was expected to take care of all the effluent from the tanks, but the trial Judge found that it is of insufficient capacity, and in consequence much of it passes by what is called "the storm overflow passage" into Ashbridge's Bay. This storm overflow passage was intended to meet emergencies; but, owing to the insufficient capacity of the overflow pipe, it is obliged to receive continuously a part of the normal volume of effluent. Further, there are two serious breaks in the outfall pipe, and through them large quantities of sewage, instead of passing into the lake, escape into the bay and there deposit much faecal matter, from which offensive gases escape into the atmosphere.

The defendants contend that they have statutory authority to establish and operate the plant and that this action will not lie. They also contend that it is being operated with reasonable care in order to prevent nuisance, and, if such is the case, they are doing all that they are required to do.

The trial Judge found that the nuisance is traceable, largely if not entirely, to the negligence of the defendants whereby they have created a nuisance injurious to the plaintiffs' property in the pleadings mentioned, the particulars of which are fully set forth in the reasons for judgment.

These findings are, in my opinion, fully supported by the evidence, and justify the judgment pronounced against the defendants in this case.

It is quite clear that, while the plant was intended to provide for the disposal of 33,000,000 of gallons per day, it is called upon



for the disposal of 45,000,000 of gallons per day. This caused the overflow and shortened the time allowed for settling.

The serious breakage in the outfall pipe has continued for a long time without any attempt to repair, and in this way a steady stream of sewage to an amount of half a million gallons per day found its way into the bay, increasing the nuisance to a very considerable extent.

No excuse is offered for the defendants' failure to repair the break or to provide a sufficient outfall pipe to the lake.

This negligence is established quite apart from the statutory right claimed by the defendants, and the judgment may well be supported on that ground; but the plaintiffs deny that the defendants have a right in this case to rely upon any statutory authority, even if that would be an answer to the plaintiffs' claim, for the reason that no by-law was passed to authorise the installation of the plant and that no approval for the plant as installed was obtained from the Board of Health. It is admitted by the defendants' counsel that no by-law can be found.

During the argument permission was given, if such by-law existed, to put in the same as part of the evidence, and counsel said that after every effort and care to ascertain whether such by-law had been passed no trace could be found, and I think it may well be taken that no by-law was in fact passed. This point was not taken, as I am informed, before the trial Judge.

Section 398 of the Municipal Act, R.S.O. 1914, ch. 192, provides that by-laws may be passed by the councils of all municipalities (7) for the construction of sewers, providing an outlet for a sewer or establishing works or basins for the interception or purification of sewage, and making all necessary connections therewith, and acquiring land in or adjacent to the municipality for any such purposes.

Section 94 (1) of the Public Health Act, R.S.O. 1914, ch. 218, provides:—

“Whenever the construction of a common sewer or of a system of sewerage, or an extension of the same, is contemplated by the council of any municipality, the council shall first submit the plans and specifications of the work together with such other information as may be deemed necessary by the provincial board, for its approval.

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"(2) The board shall inquire into and report upon such sewer or system of sewerage, as to whether the same is calculated to meet the sanitary requirements of the inhabitants of the municipality, and as to whether such sewer or system of sewerage is likely to prove prejudicial to the health of the inhabitants of the municipality or of any other municipality liable to be affected thereby." (It does not appear that the inquiry and report were made in compliance with sub-sec. 2.)

"(3) The board may make any suggestion or amendment of the plans and specifications or may impose any condition with regard to the construction of such sewer or system of sewerage or the disposal of sewage therefrom as may be deemed necessary or advisable in the public interest.

"(4) The construction of any common sewer or system of sewerage shall not be proceeded with until reported upon and approved by the board, and no change in the construction thereof or in the disposal of sewage therefrom shall be made without the previous approval of the board.

"(5) The board may from time to time modify or alter the terms and conditions as to the disposal of sewage imposed by it, and the report or decision of the board shall be final, and it shall be the duty of the municipal corporation and the officers thereof to give effect thereto."

Certain extracts from the minutes of the city council and copies of by-laws were, by consent, produced and put in upon the argument.

From these it appears that by-law No. 5167 was passed on the 14th July, 1908, which recites that, in the opinion of the council, it has become desirable that the sewage of the city shall be prevented from overflowing into the waters of Toronto Bay, Ash-bridge's Bay, and the lake, in the immediate vicinity of Toronto, and a system of sewage disposal shall be adopted.

In the report No. 15 of the board of control it is recommended that by-laws be submitted to the qualified ratepayers to vote thereon to authorise debentures for trunk sewers and sewage disposal plant to the amount of \$2,400,000.

This report of the board of control was adopted by the council on the 26th May, 1908, by by-law No. 5167, which enacts provisions for raising the money required, but no by-law was passed authorising the construction of the plant.

By-law No. 5194 provides for the purchase of certain tracts of land as a site for the sewage disposal plant.

The trunk sewer proposition provides for the construction of high and low level intercepting sewers and clarification of the sewage by means of septic tanks—these works to be constructed south of Queen street and in close proximity to Ashbridge's Bay—and it gives the estimated cost of the trunk sewer.

The report further recites that the vice-chairman of the board of health and the medical health officer and deputy city engineer were authorised to visit Philadelphia and other cities in the United States where extensive plants had been recently installed and efficiently operated, and their report is appended.

The report of this committee is signed by Charles Sheard, M.D., C. L. Fellowes, deputy city engineer, and W. S. Harrison, M.B., representative of the board of control, and is set forth in the said report No. 15.

On the 15th December, 1908, the city engineer (Rust) wrote a letter to Dr. Charles Sheard, chairman of the board of health, stating that on the 15th December, 1908, the board approved the plans for the construction of two intercepting sewers and for the construction of septic tanks in the neighbourhood of the Woodbine.

After approval by the board, opposition developed on the part of the property-owners in the neighbourhood of the location of the tanks, and the city council engaged the services of J. G. Watson, C.E.M.I.E., of Birmingham, England, and Mr. Rudolph Herring, of New York, to advise upon some change in the methods of constructing the tanks. The city engineer then submits for the approval of the board the plans as amended. The receipt of this letter is acknowledged on the 25th January, 1910, stating that the same will be submitted to the board at the next meeting, and in the meantime he asks that a copy of the plans be forwarded to the health office for filing.

The city engineer the next day acknowledges receipt of the letter and asks that the plans be returned to have copies made of them. The amended plans were approved by the board and returned to the city engineer on the 11th February, 1910, but it does not appear that the board did more than approve of the plans.

No description of the method proposed was presented to the board for their approval, nor did they give any approval of such

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method beyond that disclosed by the plans, and it does not appear that any further or other report and approval by the board was made or given.

The letter from the city health officer to the city engineer (Rust) of the 11th February, 1908, states that the plans are returned, and "I am instructed to inform you that same were duly approved of by the board at a special meeting held yesterday. You will note certificate of approval on each plan."

Neither these plans with the certificate nor a copy of the certificate were produced in evidence at the trial. I understood counsel to say that changes were made in the plans which were not approved, and certainly the approval of the board was not obtained for the discharge of the effluent into the bay, nor did the board approve of the defendants loading the system with a larger quantity of sewage than that it was made to carry, thus causing the overflow.

It was said by counsel that this increased quantity of sewage began at or very nearly after the time the works were completed; and on the 3rd July, 1913, complaint was made of the nuisance, and the council adopted a resolution "that the board of control and city officials be requested to at once abate the nuisance caused by the sewage being taken into the Morley avenue septic tanks;" and on the 19th July this resolution was forwarded to the commissioner of works.

On the 4th May, 1914, a deputation of property-owners, residing in the vicinity of the Kingston road and Queen street, appeared before the board and protested against the unsatisfactory operation of the sewage disposal works at the foot of Morley avenue, claiming that the stench arising therefrom was almost intolerable at times.

The board ordered that the foregoing be referred to the commissioner of works with the request that he make a thorough investigation and "advise if there is anything that can be done," etc., etc.

On the 6th May, the board forwarded to the commissioner of works the minutes of the meeting held on that day, and he was asked to report:—

(a) Is there any likelihood that the sewage disposal plant at Morley avenue will be less of a nuisance during the present summer than it was last summer?

(b) Are any steps being taken or can any steps be taken to abate the nuisance?

(c) Are sewage plants of a like character in other cities equally objectionable?

(d) Are there any steps that can be taken or can the city by the expenditure of additional moneys during the present summer abate this nuisance?

(e) If the nuisance cannot be abated, is the construction such that the plant can be abandoned and the sewage disposed of as formerly until such time as an improved system can be installed?

On the 12th May following, the plaintiff Fieldhouse refers to his letter of the 23rd April to Commissioner Harris, to which he had received no reply, and complains that, unless something is done at once to make this a safe place to live, and compensate him for the damage up to the present time, he will bring action. This letter was sent by the commissioner of works to the city solicitor. On the 16th June, 1914, the board of control passed a resolution that the commissioner of works be asked to report forthwith the names of the experts who advised the construction of the sewage disposal plant at the foot of Morley avenue, and that he forward to the board a copy of the reports made by them in relation thereto. The reports are dated the 9th March, 1909, made by Messrs. Rudolph Herring, C.E., of New York, and John G. Watson, C.E., of Birmingham, England, with reference to the sewage disposal plant, and were forwarded to the mayor.

It is pointed out in this letter that the experts replied to a series of questions propounded by Mr. Rust, the city engineer, in the communication to them dated the 2nd March, 1909, and attention is drawn to question No. 2—the experts suggest that the sludge should be pumped daily to the western end of Ashbridge's marsh, there to be mixed and covered with refuse deposited by the street commissioner's department. They state that, in their opinion, if this course were followed with ordinary care, no offensive odour would be perceptible more than a short distance from the site of deposits. It is further stated that this plan was not followed, but instead a large area was enclosed with piling, adjoining the sewage disposal works, for the deposit of the sludge therein, and it is from this that the offensive odour emanates.

In reply to question 3, the experts state that no nuisance will

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arise from the tanks if they are properly constructed and operated. "This has been borne out by our experience. The offensive odour comes from the sludge and not from the tanks."

Replying to question 4, they state that residents in the neighbourhood of the tanks will experience no odour from them; but, if the sludge were deposited in proximity to them, they are of opinion that cause for complaint would arise. The condition which they predicted in this reply is now evident.

"I have consulted with the city solicitor herein, and he advises that the city has no remedy as against the experts, even had they advised that the present system in its entirety would be inoffensive. It is but just to point out, in this connection, that the advice of the experts relative to sludge disposal was not followed, and the condition which they foresaw if sludge were deposited contiguous to the premises has eventuated."

It thus appears that, the defendants having taken the advice of eminent experts, this advice was not followed, and in adopting a different plan they were forewarned by the experts as to what would follow and what did follow, namely, the creation of a nuisance intolerable to property-owners, that has continued to this day and still continues, and this in spite of repeated protests of property-owners residing in that vicinity. Such a deputation waited on the board on the 2nd July, 1914; and on the 8th July, 1914, the board ordered that the commissioner of works be requested to submit a report shewing the necessary "improvement which in his opinion should be made to the Morley avenue sewage plant in order to render the system satisfactory."

On the 18th July, 1914, the council, following up the order of the board, resolved "that the works commissioner be requested to report at the earliest possible time a way of remedying the smells at the Morley avenue sewage disposal works." And a resolution was passed by the board on the 20th July to the same effect.

On the 16th November, 1914, the city council passed the following resolution: "That the board of control be requested to undertake at once, through the works department and the medical health department, a comprehensive inquiry into the most effective method of abating the nuisance caused by the Morley avenue sewage disposal plant, securing whatever expert advice is necessary, and reporting to the council at the earliest possible date a plan with details and estimates of cost."



On the 12th December the commissioner of works replied that "conditions have been such since last summer as to practically obviate complaint. This was accomplished by reducing the area over which the sludge was deposited, thereby decreasing the surface over which gas might be evolved."

This is a partial abatement, for the time at least, of the nuisance mentioned by the council. But the abatement would seem to have continued for only a short time, for, on the 5th May, 1915, the residents of that neighbourhood, through their solicitors, made complaint to the provincial board of health "of the unbearable stenches and stink given out at times from the city's sewage disposal plant on the shore of Ashbridge's Bay in that locality." They say the plant is a "bungle," the operation of it an unbearable nuisance, and Ashbridge's Bay there, where it is used, a seething cesspool and menace to public health, and they want proceedings taken to abate the nuisance or indict the city for creating it. "Before taking steps we would like to ask you to visit the place."

The provincial inspector of health, Dr. R. W. Bell, was sent to examine, and made a report in which he said: "I have no hesitation in pronouncing the complaints as well-founded, as the pollution of the atmosphere by this plant cannot help but be a nuisance and menace to the health of the near-by residents who are compelled to breathe it. Undoubtedly some different method of treating and disposing of the sludge is required and should be insisted upon without unnecessary delay." Inspector Bell fully confirmed this report in his evidence at the trial.

This report was brought to the attention of the city authorities, and, after delay for one cause or another, and, after further deputations of ratepayers had visited the council, the city health officer and commissioner of works made their report on the 21st July, 1915, in which they state: "The sewage tanks were not designed for the storage of sludge, the intention being to discharge the accumulation of fresh sludge into Ashbridge's Bay for reclamation purposes. If this method had been adopted, serious consequences would have followed."

Upon the completion of the plant it was deemed advisable to "confine the sludge within a definite area, contiguous thereto, and for the purpose a portion of Ashbridge's Bay immediately to the south was enclosed. After considerable sludge had been

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deposited in this area the ebullition of gases caused odour. In order to minimise this, about 18 months ago, we split the aforementioned area into comparatively small pockets, which virtually act as separate digesting lagoons. Sludge was deposited in each of these until filled—in this way the sludge depth was increased and the superficial area exposed to the atmosphere reduced, thereby retarding the rate of gas ebullition. Immediately upon the discharge of fresh sludge, the deposit is covered with shavings, and lime or bleach spread thereon. This method has proved quite effective, and is being continued.”

It will be observed that the principal causes referred to by the trial Judge as creating the nuisance, namely, not sufficiently protecting and covering the piles of screenings, the overflow of the effluent into the bay, caused by breaks in the outfall pipe, and the plant not being sufficiently large to carry off the increased amount of sewage, and other matters referred to in the evidence and by the trial Judge, are not mentioned in this report.

Upon receipt of this report, the board of control passed an order asking the commissioner of works “what should be done to remedy matters at the . . . plant.”

The matter was taken up from time to time by the council and by the board, but nothing has been done, the breakage has not been repaired, the overflow continues to the extent of half a million gallons per day, and the evidence is overwhelming that the operation of the plant creates an intolerable nuisance.

It is quite clear that the board of health never approved of the plant as it has been operated. It thus appears upon the evidence and findings that the defendants, without the authority of a by-law and without the approval of the board of health, have constructed, maintained, and operated a plant causing a nuisance, and thereby causing damage to the plaintiffs’ land. Having taken the advice of experts, the defendants did not follow the same, and in departing therefrom created the nuisance complained of. The works as now established and operated were not authorised by statute; and, under the facts and circumstances in this case, the defendants cannot rely upon the statute as an answer to the plaintiffs’ claim.

The general rule of law is that if the thing complained of, although an act which would otherwise be actionable, be authorised by statute, then no action will lie in respect of it, if it be the very thing that the Legislature has authorised.

See *Corporation of Raleigh v. Williams*, [1893] A.C. 540; *East Fremantle Corporation v. Annois*, [1902] A.C. 213; *Faulkner v. City of Ottawa* (1909), 41 Can. S.C.R. 190.

In this latter case it was held, Idington and Duff, JJ., dissenting, that damages being claimed for flooding of the plaintiff's premises by water backing up from the sewer, the city was not liable where it was shewn that the standard there adopted was recognised as sufficient to meet the requirements of good engineering and was the standard adopted by the cities of Canada and the Northern States. It is said by Duff, J., one of the dissenting Judges (p. 213), that "the principle is equally applicable to persons and bodies acting under legislative authority for their own profit and to public bodies exercising powers conferred upon them for the public benefit. In both cases where the authority is in general terms merely it may be inferred from the general scope and provisions of the statute that the powers conferred are not to be exercised to the prejudice of private rights. This was the view taken of the statute under consideration by the House of Lords in *Metropolitan Asylum District Managers v. Hill*, 6 App. Cas. 193, and of that construed by the Privy Council in *Canadian Pacific R.W. Co. v. Parke*, [1899] A.C. 535. It is, nevertheless, entirely a question of the true meaning of the statute."

He refers to Lord Halsbury's statement of the law in *Westminster Corporation v. London and North Western R.W. Co.*, [1905] A.C. 426, 427, where he said:—

"Assuming the thing done to be within the discretion of the local authority, no Court has power to interfere with the mode in which it has exercised it. Where the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorised."

Upon this passage Duff, J., observes that it "must be read subject to two important observations, that is to say, that in the absence of some provision (either express or clearly implied) to the contrary it must be taken that in carrying out works authorised by a statute or in exercising powers conferred by a statute you are not to act negligently and you are to act reasonably, that is to say,

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you are to prosecute the work or you are to exercise the power, as the case may be, in such a manner as not to do unnecessary injury to others. Lord Macnaghten, at p. 430, said: 'It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first.' "

In *McClelland v. Manchester Corporation*, [1912] 1 K.B. 118, Lush, J., said (pp. 129, 130), quoting Lord Blackburn in *Geddis v. Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, at pp. 455, 456: "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

In *Thompson v. Bradford Corporation*, [1915] 3 K.B. 13, *McClelland v. Manchester Corporation* was followed, and it was held that where the post office authorities had removed a pole and filled in a hole, and shortly afterwards the corporation threw the road open for traffic, the defendants were liable, "the corporation upon the ground that they were altering the character of part of an old road . . . and their duty was so to make it that when they threw it open for public use it should be reasonably safe for the purposes for which it was intended to be used; the post office authorities upon the ground that having done, perhaps voluntarily, a piece of work, they did it negligently." Bailhache, J., said (p. 22): "If a person does a piece of work negligently, although he need not have done it at all, he is liable for the consequences of his negligence. If he undertakes to do it he must do it with reasonable care, and the post office authorities appear to have neglected their duty in that respect, and on that simple ground, apart from the statute, it seems to me they are liable."

In *Re J. F. Brown Co. Limited and City of Toronto* (1916),

36 O.L.R. 189, 29 D.L.R. 618, the official arbitrator awarded damages for injuries to the claimants' land by the erection of and maintaining upon and under the street upon which the land abutted a public convenience. The Appellate Division equally divided in opinion as to the right of the land-owners to recover under sec. 325 of the Municipal Act, and the award of compensation was, in the result, affirmed.

This section, 325 (1), of the Municipal Act, expressly provides that where land is injuriously affected by the exercise of any of the powers of a corporation under the authority of the Act the corporation shall make due compensation for the damages necessarily resulting therefrom. In such a case (2) the amount of compensation, if not mutually agreed upon, shall be determined by arbitration.

It may be, probably is, the fact in the present case, that a portion of the damages suffered by the plaintiffs necessarily resulted from the exercise of such powers, and so it might to that extent be a subject-matter for arbitration, and it was urged by counsel for the defendants that the plaintiffs could only recover that portion of the damage occasioned by the negligence (if any) of the defendants. I am not of that opinion. Where, as here, the plaintiff has a right of action, and it is impossible to say what proportion, if any, of the damages necessarily resulted from the exercise of such powers, the remedy is not confined to arbitration. The case is not within sub-sec. (2). The appropriate remedy is by action, where full damages may be recovered.

Compensation for injurious affection was first provided in the Municipal Act of 1873, sec. 373: *In re Yeomans and County of Wellington* (1878), 43 U.C.R. 522, affirmed (1879) 4 A.R. 301.

"When no land has been taken, the words 'injuriously affected' . . . are limited to loss or damage under the following heads:—

"1. The damage or loss must result from an act made lawful by the statutory powers of the promoters.

"2. The damage or loss must be such as would have been actionable but for statutory powers.

"3. The damage or loss must be an injury to lands, and not a personal injury, or an injury to trade.

"4. The damage or loss must be occasioned by the construc-

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tion of the authorised works, and not by their user:" Cripps on Compensation, 5th ed., p. 136; and see *In re Collins and Water Commissioners of Ottawa* (1878), 42 U.C.R. 378, 385.

It was held in *City of Hull v. Bergeron* (1913), 9 D.L.R. 28 (Que.), that where a statute provides for indemnity to be fixed by arbitration, that does not deprive the injured person of his common law recourse, if he has any, and he may therefore sue for damages without any reference to arbitration, and reference was made to what was said by Patterson, J., in *Williams v. Township of Raleigh* (1892), 21 Can. S.C.R. 103, 131, but apparently it is overlooked that that learned Judge went on to say that "if the act that injures you can be justified as the exercise of a statutory power you are driven to seek for compensation in the mode provided by the statute, or if (as has sometimes happened) no such provision is made you are without remedy."

Here, in sub-sec. (2) of sec. 325 the word "shall" is used, but sub-sec. (1) gives the right to compensation where property is injuriously affected.

I am of opinion that where, as here, the major part if not all of the damage arose from negligence in the operation of the plant, and it seems impossible to assign any particular portion of the injury to the lawful exercise of the powers given, the plaintiff is not precluded from recovering full compensation in the action which he is compelled to bring in order to seek an adequate remedy.

The fourth heading, as quoted above from Cripps, that "the damage or loss must be occasioned by the construction of the authorised works, and not by their user," may not have full application to the present case under the Municipal Act; but, if it has, the damage here was occasioned by the user of the plant, and might under that heading not be protected by the statute.

For authorities bearing upon this case, see Meredith's Municipal Manual, pp. 24, 25, 353.

As to the weight of evidence in a case of this kind, see *Great Central Railway v. Doncaster Rural District Council* (1917), 15 Local Government Reports, part 1, p. 813. This was a case of sewage refuse. A large number of witnesses for the plaintiffs stated that the smells were dangerous to health. An equal number of witnesses for the local authorities swore that the smells were not serious and not detrimental to the public health, and that



they had greatly diminished or ceased altogether since the tip had been covered by a layer of earth. Held, that where, as in *Bainbridge v. Chertsey Urban District Council* (1914), 13 Local Government Reports 935, a strong weight of reliable positive evidence is produced by the plaintiff, such evidence cannot be set aside by reason of mere negative testimony on the part of the defendants.

Here the plaintiffs' evidence was to my mind overwhelming against the evidence offered by the defence.

In the present case the defence under the statute fails, in my opinion, because: (1) the requirements of the statute in regard to by-law and sanction by the board of health were not complied with; (2) the damages suffered by the plaintiffs were caused by the defendants through their negligence; (3) while the evidence is conclusive that the plaintiffs suffered damages, it is impossible to say whether any portion of such damages necessarily resulted from the exercise of the defendants' powers.

The appeal should be dismissed with costs.

MAGEE, J.A., agreed with CLUTE, J.

MACLAREN, J.A.:—This is an appeal from a judgment of Mulock, C.J. Ex., rendered on the 29th January, 1918, whereby he held that the defendants had created a nuisance by the establishment and operation of a sewage plant in the vicinity of Ashbridge's Bay, near the property of the plaintiffs, and condemned the defendants to pay the plaintiff Fieldhouse \$600, or such other sum as might be ordered in case of a reference: the defendants to have until the 1st May, 1918, to abate the nuisance.

I quite agree with the findings of the learned Chief Justice upon the mass of evidence brought before him, and I do not see how he could have found otherwise. The neglect of the defendants in not repairing the broken waste-pipe and in allowing the enormous escape of fetid sewage seems to be inexplicable.

There is, in addition, what I consider to be even a stronger ground, and which does not appear to have been brought to the attention of the learned Chief Justice. Such a work comes under the provisions of sec. 94 of the Public Health Act, R.S.O. 1914, ch. 218. It has not been shewn that the provisions of this Act were complied with, and no by-law of the city council ordering it has been produced.

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I am consequently of opinion that the appeal should be dismissed.

The time for the abatement of the nuisance should be extended to the 1st March, 1919.

HODGINS, J.A.:—I agree with my brother Clute in his analysis of the evidence in this case. This sewage disposal work may have been done and maintained in the way described therein under the pressure of necessity and with every desire to minimise its unpleasant results. But, while recognising this, the Court is bound to inquire why the provisions of the Public Health Act were not followed, or, if followed, why that fact was not properly proved.

I regard that Act (R.S.O. 1914, ch. 218, sec. 94) as intended to modify the usual powers of a municipality with regard to a system of sewage or of sewage disposal by making the approval of the provincial board of health a prerequisite to their exercise. Before that approval is given, the board is charged with the duty of ascertaining whether the system "is calculated to meet the sanitary requirements of the inhabitants of the municipality, and as to whether such . . . system of sewerage is likely to prove prejudicial to the health of the municipality or of any other municipality liable to be affected thereby."

It is also empowered to make suggestions and impose conditions in regard to the construction of the system or "the disposal of sewage therefrom as may be deemed necessary or advisable in the public interest."

The work cannot be proceeded with until approved of, and no change in the construction of the system or disposal of the sewage therefrom is to be made "without the previous approval of the board."

While the board may modify or alter the terms and conditions which it has laid down as to the disposal of the sewage, its decision, while standing, is final, and the duty of giving effect to it is directly laid on the municipal corporation itself as well as on its officers.

This very reasonable and extremely simple method of proceeding puts the responsibility upon the provincial board of health, where it properly belongs. It supplies the corporation with an answer to complaints, because the statute declares it to be the duty of the corporation to give effect to the decision of the board.

There is also eliminated the need for considering whether the corporation has adopted the best system, because the exact proposals are required to be set out in plans and specifications, which the board may modify, and the execution of which may be subject to conditions imposed by the board in the public interest.

It is not to be presumed that the provincial board of health would proceed with its inquiry without some notice to those immediately concerned from the point of view of health—nor does the execution of the plans so approved prevent the work being one which is done in the exercise of the powers of the corporation.

The provisions of sec. 97 of the Public Health Act impose the further duty of such proper repair “as may be necessary for the protection of the public health.” In this respect want of repair was proved sufficient to justify the judgment under appeal.

Having failed to comply with these provisions, the appellants cannot, in my judgment, rely upon statutory authority justifying the acts complained of.

I think the appeal should be dismissed, but the time for abating the nuisance should be extended till the 1st March, 1919.

*Appeal dismissed with costs.*

[APPELLATE DIVISION.]

SEAGRAM V. PNEUMA TUBES LIMITED.

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*Fines and Penalties—Action for Penalties against Company and Secretary—Ontario Companies Act, 2 Geo. V. ch. 31, sec. 134—Default in Making out and Transmitting Summaries to Provincial Authority—Secretary “Wilfully” Permitting Default (sub-sec. 6)—Finding of Trial Judge—Appeal—Remission of Full Penalties upon Payment of Substantial Sum.*

The secretary of a company, as well as the company itself, which was incorporated under the Ontario Companies Act, 2 Geo. V. ch. 31, by letters patent issued in 1913, was *held* liable for penalties incurred under sec. 134 (6) of the Act, by reason of default in making out and transmitting to the Provincial Secretary, on or before the 8th February in the years 1915 and 1916, the summary statement prescribed by sub-secs. (1) to (5) of sec. 134. By sub-sec. (6), the secretary of a company is liable to penalties only when he *wilfully* authorises or permits the default; and in this case it was *held* by LATCHFORD, J., that the conduct of the secretary shewed that he *wilfully* permitted the default.

*Park v. Lawton*, [1911] 1 K.B. 588, applied and followed.

Judgment was given in favour of the plaintiff, a private person suing on her own behalf with the written consent of the Attorney-General, for penalties amounting to \$12,760.

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The judgment of LATCHFORD, J., was affirmed by a Divisional Court of the Appellate Division; but that Court, by way of granting some relief from the penalties, ordered (thereby varying the judgment of MIDDLETON, J., 40 O.L.R. 301) that, upon the plaintiff realising \$4,000 and interest under the judgment, the plaintiff should release and discharge the judgment as against both defendants.

AN action for penalties.

See the report of a former proceeding in the same action:  
*Seagram v. Pneuma Tubes Limited* (1917), 40 O.L.R. 301.

September 13. The action was tried by LATCHFORD, J., without a jury, at a Toronto sittings.

*George Bell*, K.C., for the plaintiff.

*Peter White*, K.C., for the defendants.

October 8. LATCHFORD, J.:—This is an action brought, with the written consent of the Attorney-General, against Pneuma Tubes Limited, a company duly incorporated under the Ontario Companies Act, 2 Geo. V. ch. 31, by letters patent dated the 2nd December, 1913, and against James Joseph Gray, as secretary of the company, for penalties alleged to have been incurred under sec. 134 (6) of the Act, owing to the default of the company and of Mr. Gray as its secretary in making out and transmitting to the Provincial Secretary, on or before the 8th day of February in the years 1915 and 1916, the summary statement prescribed by sub-secs. (1) to (5) of sec. 134 of the said Act.

By sub-sec. (7) of sec. 134, a corporation is not required to make out and transmit such a summary in the calendar year in which it was organised or went into actual operation, whichever shall first happen.

On the issue whether the company was organised in 1913 or 1914, I find that it was organised in 1913. It did not receive a certificate under sec. 112 (2) declaring it entitled to do business until February, 1914; but that is a matter quite distinct from organisation. The summary filed in February, 1914—unnecessarily in view of the provisions of sub-sec. (7) of sec. 134—declares that organisation was effected on the 11th December, 1913.

The summaries for the years 1914 and 1915 were not made out and transmitted to the Provincial Secretary until after the plaintiff had issued the writ in this action, when such summaries were prepared and filed with commendable alacrity.

The summary for 1914 should have been transmitted on or before the 8th February, 1915, and the summary for 1915 on or before the 8th February, 1916.

Default by the company and by Mr. Gray existed at the date on which the plaintiff brought her action, and for such default the company is clearly liable to the plaintiff as "a private person suing on his (her) own behalf with the written consent of the Attorney General:" sec. 134, sub-sec. (6).

A distinction is made in sub-sec. (6) which is of importance in reaching a conclusion as to whether Mr. Gray also is liable to the plaintiff.

While a corporation is liable for mere default, the secretary of a corporation is liable to penalties only when he wilfully authorises or permits the default.

By sub-sec. (4) of sec. 134 the affidavit verifying the summary is required to be made by the president of a company, or, in his absence, by a director, as well as by the secretary.

In 1914 and 1915 Pneuma Tubes had but three directors—Graham, Burgess, who was president, and Mr. Gray.

It is contended that, as Mr. Gray deposes that he was willing to make the summary for each of the years mentioned, but could not have it verified in either year by Graham or Burgess, he did not wilfully authorise or permit the default, and is therefore liable to no penalty.

Certain facts are of importance in determining whether effect can be given to this contention.

Mr. Gray is a barrister and solicitor in active practice in the city of Toronto. He was one of the five shareholders who applied for incorporation and were named in the charter as provisional directors. He states in his summary of the 12th February, 1914, that he is the secretary, the treasurer, and a director of the corporation. In the summaries for 1914 and 1915, filed on the 11th November, 1916, Mr. Gray certified that he was still secretary of the company and one of its directors. His functions as treasurer appear to have ended, and no successor is stated to have been appointed to that whilom important position. The head office of the company is given in the return for 1913 as No. 304 Lumsden Building. In the returns for 1914 and 1915 it is stated to be 43 Imperial Life Building. Mr. Gray's law office in 1913 was in

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the Lumsden Building, where he occupied room No. 304. In 1914 and 1915 it was in the Imperial Life Building, where he occupied room No. 43. The head office of the corporation was always in Mr. Gray's office. As a director of the company and as its solicitor, secretary, and only treasurer, he was more in control of its management than either or both of his associates. In the occasional absences from Toronto of Burgess and Graham, the entire control of the company's affairs—such as they were—was in Mr. Gray's hands.

Mr. Gray knew what his duty was in the premises. In June, 1916, he was notified by an officer of the Provincial Secretary's department that the summaries for 1914 and 1915 had not been filed, and forms for the summaries were sent to him, accompanied by a request that the statutory returns be made forthwith. Mr. Gray says it did not occur to him to mention the matter to Graham. It may be that Graham was absent at the time from the city. "Burgess," Mr. Gray "thinks," or "is positive"—he puts it both ways—"was told the returns had to be made. I think Burgess did not take the matter up, and it just drifted along."

I find that Burgess or Graham was in Toronto for considerable periods after the returns for 1914 and 1915 should have been made; that both were here on occasions at the same time; and that at no time until after the writ in this case issued was any step taken by the defendant Gray towards the preparation even of the returns. There may have been times when, had the summaries been made out, the concurrence of Graham or Burgess in the verification of a summary might have been obtainable only with some difficulty; but I am satisfied that the occasions were many indeed during the periods of default when such concurrence could have been easily secured. However, not the first step was taken to prepare the summaries for 1914 and 1915 until the issue of the writ in this case brought home to Mr. Gray a realisation of the possible consequences of his default.

He was free at all times to exercise the power that was in his hands, and at least to attempt to comply with the statute. Had he prepared the summaries, as he alone could, and asked the concurrence of Burgess, or, upon his refusal, of Graham, in verifying them, and been refused, or if he had otherwise shewn that he could not induce one of them to join in such verification, his



default could not, I think, be properly regarded as wilfully permitted. The readiness with which in the end he was able to have Graham unite with him in making the requisite affidavits is of some slight weight as indicating what he might have done at the proper times had he performed the duty which he knew to be his.

Even were the point not governed by authority, I should in the circumstances have no hesitation in concluding that Mr. Gray wilfully permitted the default. The decision in *Park v. Lawton*, [1911] 1 K.B. 588, confirms me in my opinion.

In that case two directors of a company were charged with an offence under sec. 26 of the Companies (Consolidation) Act, 1908, in that they "knowingly and wilfully permitted default to be made by the company in forwarding to the Registrar of Companies a copy of its list of members, with summary as to capital and shares, etc., for the year 1909, as required by sec. 26, which provides that a company 'shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only general meeting in the year, are members of the company,' which list, containing the various particulars specified in the section, must be completed 'within seven days after the fourteenth day aforesaid,' and a copy thereof is to be forwarded forthwith to the Registrar." No general meeting of the company had been held in 1909. The company was in default in that respect, and Lawton and another director were each of them knowingly parties to such default. On the part of the two directors it was contended, upon the authority of *Regina v. Newton* (1875), 45 L.J. M.C. 41, that, no meeting having been held in 1909, it was impossible to make up the list required by sec. 26, and that they could not therefore be convicted of a default for omitting to do that which it was impossible for them to do. The Justices were of opinion that, although the annual list and summary had not been forwarded, yet, there having been no meeting in 1909, they could not convict the two directors. The question for the opinion of the Court was, whether this decision of the Justices was correct in point of law.

It was held by the Court—Lord Alverstone, C.J., and Hamilton and Avory, JJ.—that the fact that no general meeting had been held was, in the circumstances, no defence to the charge of not complying with the requirements of sec. 26.

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The similarity, amounting almost to identity, of the English statute with our own makes this decision applicable to the present case.

I therefore think Mr. Gray, as well as his co-defendant, is liable to the penalties claimed. Judgment will therefore be entered for \$12,760 and costs.

I may add that, as the order of my brother Middleton, made in this case on the 21st September, 1917, 40 O.L.R. 301, so far as upon terms it remitted in part the penalties for which the defendants might be held liable, was not complied with, the matter appears to be still open, and may be spoken to before me, if there is no appeal from this judgment.

The defendant J. J. Gray appealed from the judgment of LATCHFORD, J., and moved, in the alternative, for an order remitting the penalties for which judgment had been recovered, the motion being made under sec. 6 (1) of the Fines and Forfeitures Act, R.S.O. 1914, ch. 99.

November 29 and December 9. The appeal and motion were heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

The appellant appeared in person, and contested the learned trial Judge's finding that the appellant had wilfully authorised the default. The word "wilfully," occurring in sub-sec. (6) of sec. 134 of the Companies Act, 2 Geo. V. ch. 31, should be interpreted in the light of other provisions of the Companies Act. Section 118 shews that "wilfully" is something more than "knowingly." In sec. 134 (6) the penalty is first for default, that is, for the company's default, and then for the secretary's "wilfully" permitting the default; it must mean more than knowingly. In *In re Young and Harston's Contract* (1885), 31 Ch. D. 168, the meaning of "wilful default" in a contract was cut down to mean "knowing and intentional default;" but in penal statutes it means more. In *Johnson v. Allen* (1895), 26 O.R. 550, 553, "wilfully" was construed as "maliciously." See also the cases cited in *Johnson v. Allen* and see *Welch v. Ellis* (1895), 22 A.R. 255. The Judge's finding that the default was "wilful" loses its force if his interpretation of the meaning of "wilfully" was wrong. There is

no presumption that the default was wilfully permitted. *Norris v. Great Central R. W. Co.* (1915), 32 Times L.R. 120, shews what must be established: a state of facts inconsistent with wilfulness must be negatived. *Park v. Lawton*, [1911] 1 K.B. 588, relied on by the trial Judge, is quite offset by *Dorté v. South African Super-Aeration Limited* (1904), 20 Times L.R. 425. Penalties should be fixed with reference to the offence and without regard to the needs of the plaintiff: *Towner v. Hiawatha Gold Mining and Milling Co. of Ontario* (1899), 30 O.R. 547. Section 134 (6) imposes a penalty on a person in authority who authorises or permits some one acting for the company to bring about the default of the company. Specific intent should be proved, as in wounding with intent to kill and other like offences: *Rex v. Woodfall* (1770), 5 Burr. 2661, at p. 2667. Reference also to *Commonwealth v. Kneeland* (1838), 20 Pick. (Mass.) 206; *In re Mayor of London and Tubbs' Contract*, [1894] 2 Ch. 524, 536. In respect of the quantum of the penalty, the appellant asked for leave to appeal from the order of MIDDLETON, J., of the 21st September, 1918 (40 O.L.R. 301); unless that order was before this Court on an appeal, the appellant might be precluded from asking remission of the penalties now.

*George Bell*, K.C., for the plaintiff, respondent. The duty of verifying the required summaries by affidavit was cast primarily upon the president and secretary of the company by sec. 134 (4) of the Ontario Companies Act; and in the case of these officers, in the event of default, they must be presumed to have wilfully authorised or permitted the default until the contrary be shewn. The default having been proved, the onus was cast on the appellant, who was the secretary, to shew that he did not wilfully authorise or permit the default; and he failed to satisfy the onus. The question whether the default had been wilfully authorised or permitted was one of fact, and there is abundant evidence to support the judgment in that respect: *Gibson v. Barton* (1875), L.R. 10 Q.B. 329. The company was duly organised when the meeting required by sec. 81 was held, and the directors were elected by the shareholders, and a certificate entitling the company to commence business was not needed, nor was a meeting under sec. 115 required to complete organisation. The terms of the order made by MIDDLETON, J., on the 21st September, 1917 (40 O.L.R.

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301), not having been complied with, the motion stood dismissed; and, there having been no appeal, the matter is *res judicata*, and another motion for the same cause cannot be maintained; and, in any case, no order should be made for remission of the penalties except upon terms similar to those imposed by that order.

The appellant was heard in reply.

December 9. Judgment was given at the conclusion of the argument.

THE COURT agreed with LATCHFORD, J., that the appellant was subject to the penalties imposed by the Act; but, being of opinion that the full amount of the penalties should not be exacted, ordered that, upon payment to the plaintiff of \$4,000 and interest, the plaintiff should discharge her judgment for \$12,760. The Court dealt with the case on the assumption that leave to appeal from the order of MIDDLETON, J., 40 O.L.R. 301, had been granted and that the appeal had been heard. The plaintiff's costs of the appeal were included in the \$4,000.

The order of the Court, as settled and issued, was as follows:—

(1) Upon motion made unto this Court on the 29th day of November, 1918, and again this day, by the defendant James Joseph Gray in person, by way of appeal from the judgment pronounced by the Honourable Mr. Justice Latchford in this action on the 8th day of October, 1918, or, in the alternative, from the order pronounced by the Honourable Mr. Justice Middleton on the 21st day of September, 1917, and for an order remitting the penalties for which the said judgment has been recovered, by virtue of the power given by the Revised Statutes of Ontario 1914, chapter 99, section 6, sub-section (1), in presence of counsel for the plaintiff, and upon hearing read the pleadings in this action, the evidence adduced at the trial, and the said judgment, and the said order pronounced by the Honourable Mr. Justice Middleton on the 21st day of September, 1917, and the pleadings, evidence adduced at the trial, and the judgment therein and the order of the Divisional Court dated the 8th day of May, 1918, in the action heretofore pending in this Court of *Seagram v. Kemish*, and upon hearing what was alleged by the defendant James Joseph Gray in person

and by counsel aforesaid, this Court was pleased to direct that the said motion should stand over for judgment, and the same coming on this day for judgment:—

(2) This Court doth order that the said judgment in this action be and the same is hereby affirmed.

(3) But this Court doth further order that, upon the plaintiff realising the sum of \$4,000 and interest thereon from the date of this order under the said judgment herein, the plaintiff do release and discharge the said judgment as against both of the said defendants.

(4) And save as aforesaid this Court doth not see fit to make any further or other order as to costs or otherwise.

[MIDDLETON, J.]

BOWES v. VAUX.

*Vendor and Purchaser—Agreement for Sale of Land—Inability of Purchaser to Make Title to Small Portion—Materiality—Specific Performance with Compensation—Application of Rule—Compensation, how to be Fixed—Resale by Vendor—Attempt to Forfeit Sale-deposit—Action by Purchaser to Recover—Provision in Agreement for Return of Deposit.*

The plaintiff agreed to buy from the defendant and the defendant to sell to the plaintiff a dwelling-house with grounds and outbuildings, for \$32,000. The plaintiff, upon the execution of the agreement, paid the defendant \$3,000 as a sale-deposit. It turned out that the defendant could not make title to one part of the premises sold—a small but material part, as was found. The agreement provided that, on any objection to title being taken which the vendor should be unable or unwilling to remove, the agreement should be null and void and the cash-payment should be returned without interest. There was not on the part of either party, after the defect in title had been discovered, an offer of specific performance with compensation and a submission to an authoritative ascertainment of the proper compensation—and the plaintiff and defendant were wide apart in their conceptions of what a proper sum for compensation would be. Almost immediately after the day fixed for closing, the defendant resold the land to a stranger, for \$30,000, the contract providing that the vendor should not be called upon to make title to the small part. The plaintiff thereupon sued to recover his \$3,000, which the defendant sought to retain:—*Held*, that the defendant could not rescind the contract and forfeit the sale-deposit when he had not title to the property to be conveyed.

Discussion of the equitable doctrine of specific performance with compensation, and review of the authorities.

And *held*, that the defendant could not invoke the equitable doctrine at all, because, by the resale of the land, he had put it out of his power to resort to equity—he could not now give specific performance even with compensation.

If the equitable doctrine were applicable, the defendant was not the one to fix compensation; and he never expressed his readiness to submit to specific performance subject to such compensation as might be deemed just.

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*Held*, also, that, when the agreement itself provides for what is to happen upon certain events, it alone is to be resorted to; there cannot be any recourse either to law or equity for any other remedy.

*Ashton v. Wood* (1857), 3 Jur. N.S. 1164, followed.

And here, according to the terms of the agreement, in the event which had happened, the cash-payment was to be returned.

ACTION to recover \$3,000 in the circumstances stated below.

October 4. The action was tried by MIDDLETON, J., without a jury, at a Toronto sittings.

A. C. McMaster, for the plaintiff.

W. D. McPherson, K.C., for the defendant.

October 9. MIDDLETON, J.:—Action by purchaser to recover \$3,000, amount of sale-deposit under an agreement to purchase a house, upon the theory that, the vendor being unable to make title to part of the premises, the purchaser is entitled to rescind the contract and claim the money paid as money held by the defendant for his use.

The right to recover is also based upon the express terms of the contract itself.

The defendant contends that the portion of land to which he has no title is so small as to be negligible and immaterial, and that the purchaser, having refused to accept the title offered, is in default, and therefore the deposit is forfeited.

He also claims the benefit of an offer made to abate the purchase-price—to a limited extent—and seeks to apply the same principle as that underlying the equitable doctrine of specific performance with compensation.

It is important to note that there was not on the part of either party an offer of specific performance with compensation, leaving the amount of compensation to be determined.

The vendor fixed the compensation which he would allow, in vague terms, by the letter of the 30th April, which his counsel on the argument said meant less than \$200, while the purchaser had first asked \$2,500 and later \$4,000.

Almost immediately after the date fixed for closing (1st May), the land was resold for \$30,000, \$2,000 less than the contract-price. On the resale the contract provided that the vendor should not be called upon to make title to the small parcel in question.



The premises sold are a handsome dwelling at the corner of Roxborough street and Chestnut Park road, in the city of Toronto, and the grounds and outbuildings.

Chestnut Park road does not intersect Roxborough street at right angles but upon a curve. The house is set at an angle upon the lot so as to face this curve and front on both streets, the grounds in front being entirely enclosed by a high stone wall; the public entrance to the house is from Chestnut Park road, outside this enclosed garden. The fence is supposed to follow the street-line, but does not. On the curved portion it is several feet beyond the highway line, and upon this enclosed portion of the street are a large butternut tree and two elms. If the fence should be moved and reconstructed on the true line, these trees would be excluded from the garden, and the lawn space would be reduced by 160 feet.

The purchaser regarded the reduction as material, and he says that, in his view, the lawn is rather small as it stands.

The vendor points out that 160 feet is not much more than one per cent. of the area sold, and he regards this as so trivial a matter as to warrant the application of the maxim *de minimis*.

I cannot so regard it. Not only is there an appreciable loss of area, but there is the loss of the ornamental trees and the expense of removing about 100 feet of stone fence. This cannot be ignored. See *Brewer v. Brown* (1884), 28 Ch. D. 309.

In the view of the case which I take, the vendor's offer was not adequate. He offered to bear the cost of removing the fence and to abate the price by the proportion which this 160 feet bears to the remaining land, based upon the price of the land apart from the buildings. The injury to the premises as a whole cannot thus be ascertained.

On the other hand, the sums asked by the purchaser probably largely exceed any compensation that would be allowed upon a reference in an action for specific performance.

I asked Mr. McPherson for authority to justify forfeiture of a deposit and rescission of a contract by the vendor when he had not title to the property to be conveyed. None of the cases seem to me to justify his contention.

The doctrine of compensation is thus defined by Viscount Haldane in *Rutherford v. Acton-Adams*, [1915] A.C. 866, 869, 870:—

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“In exercising its jurisdiction over specific performance a Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he be compensated. If it is the purchaser who is suing the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject-matter described in the contract.”

In addition to this equitable compensation, there are many cases in which the contract itself provides for the adjustment of errors of description by compensation. These depend upon the contract and throw no light upon the equitable doctrine: *In re Terry and White's Contract* (1886), 32 Ch. D. 14, at p. 27; *Jacobs v. Revell*, [1900] 2 Ch. 858.

Manifestly this doctrine infringes upon the common law principles governing the law of contract. In so far as a purchaser is compelled to take something less than he contracted for, even though the price is fair, the Court is making for the purchaser a contract he did not enter into. In *Tolhurst v. Associated Portland Cement Manufacturers*, [1903] A.C. 414, at p. 422, Lord Robertson speaks of “the old and oft rejected argument that a man can be forced to do something which he never agreed to merely because it is very like and no more onerous than something which he did agree to.”

Lord Eldon, in whose time the doctrine assumed definite and tangible form, himself realised this, for he says, *Knatchbull v. Grueber* (1817), 3 Mer. 124, at p. 146:—

“This Court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have.”

In *Halsey v. Grant* (1806), 13 Ves. 73, 76, Lord Erskine says much the same thing:—

“If a Court of Equity can compel a party to perform a contract that is substantially different from that which he entered into, and proceed upon the principle of compensation, as it has compelled him to execute a contract substantially different, and substantially less than that for which he stipulated, without some very distinct limitation of such a jurisdiction, having all the precision of law, the rights of mankind under contracts must be extremely uncertain.”

The true principle is that pointed out by Lord Eldon himself in *Mortlock v. Buller* (1804), 10 Ves. 292, 306, where he speaks of it as applicable only to “some small mistake or inaccuracy . . . some of those little circumstances that would defeat an action at law, and yet lie so closely in compensation that they ought not to prevent the execution of the contract.”

This principle is affirmed in the Court of Appeal in *In re Arnold* (1880), 14 Ch. D. 270.

In each case it is a question of fact, and little would be gained by a discussion in detail of cases in which it has been found that a difference is or is not material, as on the facts here the difference is, I think, material.

It must be borne in mind that in each case all the circumstances must be looked at to determine this issue of fact. If a man is buying 1,000 feet of frontage to divide into small building lots, the loss of 50 feet frontage may be a matter of compensation, but, on the other hand, the loss of 10 feet of lawn adjoining a residence might make a vital difference. Where specific performance is sought by the purchaser, or he assents to specific performance, at the vendor's instance, with compensation, the principle applicable is widely different. To quote again from Lord Eldon (*Mortlock v. Buller*, 10 Ves. at p. 315):—

“If a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract; and, if

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the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole."

So he can insist on having all that the vendor can convey, with compensation for the difference.

The case cited and relied upon by Mr. McPherson of *Flight v. Booth* (1834), 1 Bing. N. C. 370, and a long series of cases ending with *Lee v. Rayson*, [1917] 1 Ch. 613, relied upon by Mr. McMaster, dealing with the nature of the misdescription which will entitle a purchaser to rescind, notwithstanding a provision in the contract for compensation—as already pointed out, these have nothing to do with the equitable principle under discussion.

But, in my view, the defendant cannot invoke the equitable doctrine at all, because, by the sale of the land, he has put it out of his power to resort to equity. He cannot now give specific performance even with compensation. His position need only be stated to shew how inequitable it is:—

"I agreed to sell the plaintiff property, part of which I did not own, and he paid me part of the price. I offered to him to reduce the price by an amount which I thought was fair, but which he thought inadequate, and he refused my offer. I have sold the property which I had to another, and have the price. This prevents the purchaser from claiming specific performance against me, with compensation to be ascertained by the Court, and I now claim to keep the defendant's sale-deposit."

This I have called inequitable: some might call it immoral. He who seeks to invoke an equitable principle must be prepared to do equity. How can the price be abated when the vendor cannot now convey at all?

On a minor matter the defendant is also in error. If the equitable doctrine were applicable, the vendor is not the one to fix compensation. He cannot place the purchaser in default by an offer of a named sum which he will allow as compensation, even if the named sum turns out to be adequate. The purchaser is entitled to have the amount of compensation determined by the Court. Here the vendor never expressed his readiness to submit to specific performance subject to such compensation as might be deemed just. His attitude was quite different—"Accept my

view of the amount to be allowed or I shall cancel the contract and forfeit your deposit." The purchaser is in no such jeopardy in equity.

But on another ground there is no right to retain the deposit. The contract itself must prevail, and it provides that on any objection to title being taken which the vendor shall be unable or unwilling to remove, "this agreement shall be null and void and the cash-payment returned," without interest.

When the agreement itself provides for what is to happen upon certain events, then it alone is to be resorted to, and there cannot be any recourse either to law or equity for any other remedy. This is determined in *Ashton v. Wood* (1857), 3 Jur. N.S. 1164, where there was a default in making title to one-three hundred and thirtieth of the whole. Specific performance with compensation was refused because of a similar contractual provision.

See cases collected in *Dart on Vendor and Purchaser*, 7th ed., p. 1078.

Against all this is cited *Clerke & Humphry, Sales of Land*, pp. 351 and 354. After pointing out (p. 351) that if at law the vendor had not that which he contracted to sell, the purchaser might treat the contract as at an end, but that in equity the Court determined whether the inaccuracy was such as to admit of compensation, the writer proceeds, p. 351:—

"Now that the rules of equity prevail in all the Courts, the common law rule may be regarded as obsolete, and whether the action be for a return of the deposit, or for damages . . . or for specific performance, or rescission . . . the question whether the contract is avoided by misdescription must in all cases be determined on the same principles. . ." At p. 354: "The purchaser's rights in case of misdescription are not confined to compensation. He may also, at least where the defect is so grave that the vendor cannot enforce specific performance with compensation,—

"(1) Repudiate the contract and recover his deposit; or

"(2) Rely on the contract, and obtain damages in an action, founded on the breach of the stipulation descriptive of the property.

"With reference to the first of these remedies it is unnecessary to consider it in this chapter; for the issue in such an action seems to be identical with that in the vendor's action for specific performance with compensation."

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In view of the law quoted and the reason of that law, if this means any more than that in an action to recover the deposit the vendor may by defence or counterclaim set up his readiness to submit to specific performance with compensation and so obtain relief, I can neither understand nor agree with it. If this is the real meaning of the statement, it cannot help a vendor who has precluded himself from asking specific performance by conveying to a stranger. He is then under the rigour of the common law.

*Stinson v. Hoar* (1913), 13 D.L.R. 524, is a case in which the vendor was in no way in default. The purchaser alleged misrepresentation, but that was found against him. As the purchaser was in default, the vendor could both forfeit the deposit and resell. The equitable doctrine was in no way involved.

*Belworth v. Hassell* (1815), 4 Camp. 140, is a common law case, and depends on the finding that there was no fraud or unintentional material misdescription.

The plaintiff is entitled to recover the \$3,000, with interest from the date of the writ and costs.

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## [APPELLATE DIVISION.]

July 6.

## SELLERS V. SULLIVAN.

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*Will—Document Propounded as Last Will of Testator—Onus of Proof—Suspicious Circumstances Surrounding Preparation and Execution of Document—Evidence—Finding of Trial Judge in Favour of Will—No Finding upon Question of Discharge of Onus—Appeal—Affidavits Discrediting Important Witness at Trial—New Trial.*

The *onus probandi* lies upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator. Wherever circumstances exist which excite the suspicion of the Court, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.

*Tyrrell v. Painton*, [1894] P. 151, 157, 158, followed.

In this case the testator was an old man; the will propounded was made three days before his death, when he was in a feeble condition; the will was written out by his medical attendant, but was in fact copied by him from a testamentary document which was in the possession of S., a neighbour, who was married to a niece of the testator; by that document, which was drawn by S. and signed by the testator, but not witnessed, a substantial legacy, amounting to about half the testator's estate, was given to S., and the remainder was divided between a brother and sister of the testator,



to whom by a former will the testator had left all his property; two changes were made by the doctor, but in unimportant respects; the will propounded was executed by the testator by a mark made with a pen which was put by the doctor into the hand of the testator, held there, and guided by the hand of the doctor; the will was witnessed by the doctor and a neighbour; they were examined as witnesses at the trial of an action brought for the the purpose of establishing the will, and proved the execution in the manner described; the doctor testified to the testator's instructions and that he understood what he was doing; the neighbour said that he thought the testator knew what he was doing. The trial Judge found in favour of the will. Upon an appeal to a Divisional Court of the Appellate Division, affidavits were filed in which it was stated that the neighbour who had witnessed the will had, since the trial, said things, in the presence of the deponents, which were inconsistent with material parts of his evidence at the trial:—

*Held*, by the majority of the Court, that the evidence at the trial shewed that the will was prepared in circumstances which raised a well-grounded suspicion that it did not express the mind of the testator; that suspicion not having been removed, the plaintiffs had not discharged the *onus* which was upon them of satisfying the Court that the document was an expression of the free will of a competent testator; and those opposing probate were not bound to establish fraud. Therefore, the judgment of the trial Judge (who had dealt only with the issue of fraud, and had not determined the question whether the plaintiffs had discharged the *onus*) should be set aside and the action be dismissed, unless the plaintiffs desired a new trial, which in that event should be ordered.

*Per RIDDELL, J.*:—Upon the evidence given at the trial, the judgment should not be set aside; but, in view of the new evidence adduced, which went to discredit an important witness, there should be a new trial, upon which the whole case should be open.

*Per KELLY, J.*:—There should be a new trial for the reasons given by the majority of the Court, and also for the reason given by RIDDELL, J.

ACTION to establish a testamentary writing as the last will and testament of Thomas Garniss, deceased.

The action was brought by the executors named in the document propounded, Joseph J. Sellers and one Warwick. Joseph J. Sellers was also made a defendant in his individual capacity.

The action was tried by MASTEN, J., without a jury, at Goderich.

*R. Vanstone*, for the plaintiffs.

*William Proudfoot*, K.C., for the defendant Joseph J. Sellers.

*Hugh Guthrie*, K.C., for the other defendants.

July 6, 1917. MASTEN, J.:—This is an action seeking to have established in solemn form probate of the will of Thomas Garniss, late of the township of Morris, in the county of Huron, farmer. The defences are: (1) that the will was not duly executed in accordance with the provisions of the Wills Act; (2) that, at the time of the alleged execution of the document sought to be estab-

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lished in this action, Thomas Garniss was incompetent to make a will, and did not understand the nature and effect of the document signed; (3) that the preparation and execution of the document submitted for probate was procured by the fraud and undue influence of the plaintiff (and defendant) Sellers and others associated with him.

The three contentions raised by the contestants, and noted above, dovetail into each other and stand or fall together, so that they cannot well be considered separately in reaching a conclusion.

The outstanding facts, as they present themselves to me, are substantially as follows:—

Thomas Garniss died on the 13th August, 1916; at the time of his death he was between 80 and 85 years of age; he was a bachelor, and lived on the homestead farm which had come down to him from his father. After the death of the father, he had lived on this place with his mother until her death. Afterwards he continued to live upon it alone without servants, carrying it on as a farm until a few years before his death, when he sold off all his farm stock and implements, and rented the land as pasture-land, reserving to himself the house in which he lived alone during the summer months and going to different neighbouring towns and living at a hotel in the winter-time. The value of the estate which he left is estimated at some \$10,000 or \$12,000. He was a member of a numerous family, the names of whom appear from the style of cause; with some of his brothers he had not been on good terms, and with some of the other members of the family he had little association or connection. His principal friends among his relatives were his sister Maria Sullivan and his brother George Garniss, who have lived for forty years or more in the State of Michigan, and his nieces Elizabeth Brewer and Mrs. Sellers, who occupied farms near him. Of these, he was more intimately associated with the Brewers than with any of the others, as Mrs. Brewer had for many years made regular weekly visits to the homestead during the life of her grandmother, and after her death to her uncle, the testator, for the purpose of assisting and looking after his household affairs.

To the brother and sister in Detroit the testator made occasional visits at irregular intervals, sometimes staying with them

from three to five weeks. The plaintiff Sellers was married to the testator's niece, Mrs. Sellers, and the evidence of Sellers is that the testator had been a great friend of Sellers' father, who was a near neighbour (living about half a mile away), and that, after his father's death, the relationship of the plaintiff Sellers to the testator became more intimate, the testator having acted as his adviser and assistant in looking after the matter of winding up his father's estate, and they having thereafter continued their friendly intercourse and family visits, which were quite frequent. This statement is in some measure contradicted by the testimony of the defendant George Garniss, who says that his brother, some three years ago, while George was on a visit to him, expressed a poor opinion of Sellers, and manifested some dislike of him. Other witnesses throw a side-light upon this question; and upon the whole I am of opinion and find that the relations of the testator and of the Sellers family were friendly and agreeable, though it is undoubtedly the case that the Brewers did much more for him, and were much more intimately associated with him.

The testator appears to have been a man of strength and vigour, physically and mentally, and of considerable force of will; also to have been rather strong in his likes and dislikes; and I think was peculiar and erratic during his later years, in some of his views and opinions, though not in such a way as to indicate any derangement of his mental qualities. He was of a highly secretive disposition and appears to have had a desire to mystify his relatives as to the disposition he would make of his estate.

A series of wills made by the testator are produced. The first is dated the 2nd December, 1911, by which he appoints Frederick Brewer and his wife Elizabeth executors of his will, devises the homestead to their son William, together with the farm chattels, and leaves the residue of his estate, real and personal, in equal shares to his brother George Garniss and his sister Maria Sullivan. This will was drawn up by Mr. Vanstone, solicitor.

The second will produced is dated the 20th February, 1914, and leaves all his estate, real and personal, to his brother George Garniss and his sister Maria Sullivan, share and share alike, and appoints his then solicitor, Mr. William M. Sinclair, executor.

The third will is dated the 25th March, 1916, and is in the same terms as the will of 1914. This last will was also drawn by Sinclair.

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It is explained in evidence that the will of March, 1916, was drawn because the testator thought he had lost the second will, which afterwards turned up among his papers.

The history of the occurrences relative to the will now in question in this action goes back to June, 1915. At that time the testator was living alone on his farm according to his usual summer custom; and, according to the evidence of the plaintiff Sellers, the testator had on several occasions requested Sellers to prepare a will for him, leaving to him (Sellers) a legacy of \$6,000 and the residue to his brother and sister in Detroit.

Sellers had suggested to the testator that he ought to have any will that he proposed to make drawn by a solicitor, but ultimately, according to his evidence, he yielded to the testator's desire and drew a document by which Sellers was left \$6,000 as a legacy with the residue of the estate divided between George Garniss and Maria Sullivan. This document was signed but not witnessed. Sellers says it remained at first in the custody of the testator, but, after about a month, was handed by the testator to Sellers for safe-keeping, the testator particularly requiring Sellers to say nothing about it and to keep it secret from every one. Sellers says that he then took the document home, locked it up with his private papers, and mentioned its existence to no one, and it remained in his custody until the 10th August, 1916.

Some time about the 14th July, 1916, the testator, who was then living alone on the farm, suffered an accident; he fell and broke his leg, or broke his leg and fell. It is described as a breaking of the neck of the femur. He was unable to communicate with any one, and remained on the floor until the following morning, when he was discovered by Fred Brewer and taken to the Brewers' house, where he remained until his death on the 13th August following.

Thomas McRae, a physician practising in Brussels, who had been for some time the testator's regular medical attendant, was called in and visited him on an average every other day from that time until the time of his death.

After his accident the testator gradually failed in health and strength. The decline appears to have been without marked change until the 5th August, when he had a spell of weakness such that he became unconscious. On the succeeding Tuesday,

the 8th August, he suffered from another similar spell. From both these spells he recovered, according to the testimony in support of the will, but continued declining, though enjoying the use of his mental faculties, until Saturday, when, about ten o'clock, he became unconscious, and on Sunday morning, the 13th August, he died.

The will in question was made on the morning of Thursday the 10th August. On the previous Sunday, a week before his death, according to the testimony of Sellers, a conversation took place between the testator and Sellers with reference to the validity of the supposed will of June, 1915. The question had several times previously been raised between them as to whether that document was a good testamentary disposition, not having been duly witnessed; and the testator, on the Sunday in question, according to the evidence of Sellers, requested him to consult Vanstone on the point. Vanstone's office was telephoned to, and it was found that he was away. On the evening of Wednesday the 9th August, Sellers went to Brussels along with Fred Brewer. Brewer was taking to Vanstone a written order from the testator directed to Sinclair requiring Sinclair to hand over all mortgages, papers, and other documents in his custody to Vanstone. Just why this change had taken place, or what was in the mind of the testator in giving such a direction, does not clearly appear, but he seems to have taken a whim which was not out of accord with his former course of procedure of changing solicitors. Sellers' errand was to ascertain whether the will of June, 1915, would be good if not witnessed. He did not bring the document with him, but left it at home, and put the bald question to Vanstone as to whether such a document would be effective as a testamentary disposition, and was informed that it would not. It was arranged between Brewer and Sellers that Sellers should go over the next morning to Brewer's house, where the testator was, though Brewer says he was not informed by Sellers regarding the document then in Sellers' possession. No suggestion appears to have been made with regard to Vanstone coming out to draw a proper will.

Early in the morning of the 10th, Mrs. Brewer telephoned to Dr. McRae, desiring him specially to visit the testator that day, as she thought him worse. This was arranged, and accordingly he arrived somewhere between 8 and 9 o'clock in the morning.

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On interviewing the patient, he says that he found him in better condition than from the telephone message he had expected. He told him, however, that his condition was very serious, and that if he had any business to transact before his death he ought to transact it without delay. The testator responded that he had nothing to transact excepting "the will," and requested the doctor to telephone to Sellers and ask him to come over and bring the will which he had. Accordingly Dr. McRae telephoned to Sellers asking him to come over at once and to bring the will, which he did.

Sellers says that when he arrived at the Brewers' he went alone to the bedroom where the testator was lying, and the conversation was as follows: "He asked me if I had seen Mr. Vanstone about the will. I said 'Yes, it won't stand law,' and he says, 'Give it to Dr. McRae.'" Accordingly Sellers then handed the document which he had to McRae. According to his own testimony, Dr. McRae then went in alone to the testator and read over to him the document Sellers had brought. The testator then said it was all right, except that he desired to insert in it a provision of \$100 in favour of Mrs. Brewer, and desired McRae to re-draw the will making that change. McRae then suggested to him the desirability of two executors instead of one (Sellers had been named sole executor in the first document), and to this the testator acceded, and asked McRae to put in another name. McRae declined to name the other executor, and then the testator asked him to name various neighbours who might be eligible; and, after naming several, McRae named Dr. Warwick, and at that point the testator stopped him and approved of the appointment of Dr. Warwick. McRae then came out into the sitting-room which adjoined the testator's bedroom; and, all the other persons in the household, namely, Mr. and Mrs. Brewer, Sellers, and the other members of the family, having been sent to separate parts of the house, he alone wrote out the will in question, which, according to his testimony and that of Sellers, accords exactly with the original document prepared by Sellers in June, 1915, except that it makes a provision of \$100 for Mrs. Brewer and appoints Dr. Warwick as an additional executor. McRae had already pointed out the necessity of an independent witness besides himself, and one Kearney, a neighbouring farmer, had been



telephoned for and came over at once to the Brewers' house to act as witness. Kearney and McRae then went into the testator's room, and McRae read over to the testator the will which he had drawn, and the testator approved of it, after first inquiring the meaning of the clause which reads, "I direct that all my just debts, funeral and testamentary expenses, be paid as soon after my decease as may be convenient," asking whether that meant that his sickness expenses might have to be paid at once during his lifetime. Upon the meaning being explained to him, he approved of the will. The will was then executed by the testator, by means of a mark, in the following manner: the testator was lying on his back in bed, unable to rise; McRae placed the pen in his hand, put his hand over the testator's, and either made the mark or guided and steadied the testator's hand while he made it. Physically it was impossible to say which was done, but I find as a fact that the testator willed and intended the execution of the document and that what he did was a sufficient execution of it. This was in the presence of both McRae and Kearney, present at the same time, and thereupon they signed as witnesses in each other's presence and in the presence of the testator. McRae then took possession of the will; and, after coming out, informed the other parties for the first time that a new will had been executed, but did not inform them of the contents, and the original document of June, 1915, was then burned by McRae in the kitchen stove in the presence of all parties. Mrs. Brewer says that she first became aware of the contents of the will in question on the evening of the 10th. Just how does not appear.

With reference to the competence of the testator to make a will, and his understanding of the nature and effect of what he was doing, and with respect to the contention that he was not on the 10th of August of sound mind, memory, and understanding, the relevant evidence is substantially as follows:—

Dr. McRae is a local physician in good repute. He has been for some nine years in practice in the county of Huron, and for some time prior to the events in question the regular medical attendant of the testator. He swears that, in his opinion, the testator thoroughly understood what he was doing, and was entirely competent to exercise disposing power. He details the directions which the testator of his own motion and direction gave and made:

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first, expressing to McRae his desire to have him draw up a new will; second, in directing him to have Sellers come over and bring the document which contained his testamentary intention (save and except as to the \$100 to Mrs. Brewer); third, his appreciation and understanding of that document when it was read over to him, and his repetition of the direction with respect to the \$100 legacy; fourth, his positively naming Dr. Warwick as an executor; fifth, his inquiry as to the meaning of the clause relating to payment of debts; and lastly, on the same day, in the evening, his statement when visited a second time by McRae. On that occasion McRae asked him how he was, and his reply was: "I ought to feel pretty well, a gentleman like you coming to see me twice in one day." McRae's summing up of his opinion is that, while the shock of the fractured thigh lowered the mental vigour of the testator, it did not produce any mental derangement; and that, while his mental vigour may have been lowered, there was ample left at the time of the making of the will to enable him effectively to exercise disposing power.

James Kearney, the other witness to the will, agrees substantially with McRae's statements as to the circumstances under which he became a witness, and as to the fact that the testator, after hearing the will read over, inquired as to the meaning of the clause respecting the payment of debts, and as to the reading over of the will clause by clause. When pressed in cross-examination, he said: "He (meaning the testator) was not able to carry on a conversation, or anything of that kind? A. Oh, no, I would not say that. At least I didn't hear him. Q. Well, then, the whole thing was practically done by Dr. McRae? A. Oh, yes, practically." In answer to another question, he said: "I would certainly have to swear that I think the old man knew what he was doing, to the best of my knowledge." "The doctor read the will over very distinctly." I was much impressed with the candour of this witness, and his desire to tell the whole truth; also with his firm belief that the testator quite understood what he was doing, and that the will as drawn embodied his real intentions. No suggestion is made by those opposing the will that this witness was concerned in any plot improperly to procure the execution of the will in question.

I refer specifically to the evidence of one other witness by

whose testimony I was much impressed. Fred H. Gilroy, manager of the Bank of Nova Scotia at Brussels, visited the testator on the 17th July and again on the 23rd July. He said that on the second occasion the testator seemed to have visibly failed and to be in a sort of torpor, as though the doctor had given him an opiate. He, however, succeeded in arousing him and in satisfactorily discussing matters with him to such an extent as to receive instructions and directions regarding the transfer of certain bank balances; but, on coming back in a few minutes from doing the writing necessary to carry out the instructions received, he found the testator asleep, and had to arouse him again. He will not say that the testator's mental condition was bad, but he made all his signatures by marks. The business then done was to sign cheques transferring the moneys which he had in various other institutions all to the Bank of Nova Scotia. His mental condition was evidently very feeble on the 23rd July, which was three weeks before his death, and the decline is shewn to have been progressive.

The expert witnesses are all men of standing and experience, and their testimony was fairly given, but they balance each other; and, after carefully considering this testimony, I find that I must dispose of the question on the evidence of the disinterested witnesses who saw the testator.

The demeanour and evidence of Dr. McRae struck me as being not quite as spontaneous and frank and complete as would have been expected from a professional man in his position, but in making that observation I am very far from discrediting his testimony. The discrepancy between the evidence of Fred Brewer and the plaintiff Sellers is noteworthy and conduces to suspicion, and of the two I prefer Sellers' account. Mrs. Brewer's testimony disagrees flatly with that of Sinclair and Robert Garniss, and I am wholly unable to frame any theory that will reconcile their statements. Mrs. Sullivan, I think, imported considerable feeling into her testimony, and I do not very strongly rely upon the account given by her of the conversation with Mrs. Brewer in which, she alleges, Mrs. Brewer told her that the testator had been unconscious since a week from Saturday. I think she has overstated what Mrs. Brewer told her, and that Mrs. Brewer did tell her what she said in the witness-box, namely, that he had had a bad spell on Saturday and again on Tuesday, and had been rapidly

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declining since. I prefer Mrs. Brewer's account of this to Mrs. Sullivan's. With respect to George Garniss, I think he gave his evidence very frankly and honestly, and his statements in regard to the attitude of the testator towards Sellers impressed me as true. At the same time, I do not lay very great stress on these incidental gossipings of old men three years ago. The testator was a man who evidently changed his mind from time to time; he was whimsical, and I should fancy might have been capable of talking in very different ways at different times to different persons.

The witness Kearney gave his evidence absolutely honestly and to the best of his ability. He is a farmer, not highly educated, not expressing himself readily. His evidence is in some respects contradictory, and he puts a thing in one way at one time and in another way at another time, but he thoroughly believed that the testator knew what he was doing, and intended to make his will as he did. He has no interest to serve, and I rely very considerably on his testimony.

Other witnesses gave evidence of greater or less importance and more or less contradicted each other, but I do not pause to discuss it in detail; and, beyond what I have said above, no further observations present themselves to me as likely to be of assistance to an appellate Court in weighing the evidence.

Those opposing probate allege that Sellers and his wife, Brewer and his wife, and Dr. McRae, at first entered into an arrangement or conspiracy to procure by undue influence the making of this will, and now, to present a case to the Court representing the situation as other than the facts warrant. They put their case boldly in this way: that there was no reasonable motive or basis why this testator should leave the large bulk of his property to Sellers, who was no relative (except by marriage); that the evidence of George Garniss indicates that the testator had not a high opinion of Sellers three years before his death, nor any friendly feeling for him; that the document purporting to have been drawn in June, 1915, and leaving this large sum to Sellers, is absolutely at variance with the will drawn in March, 1916, which leaves everything to his brother and sister in Detroit; that it is inconceivable that such inconsistent documents could have been drawn in the way these were; that the alleged burning of the

document of June, 1915, immediately after the will of the 10th August was executed, so that it cannot now be seen, is a highly suspicious circumstance, and that these things, taken together, lead to the conclusion that no such document ever existed; that it is a manufactured story, and that the will in question was really a new will drawn in August by Dr. McRae at the instance of Sellers and forced upon the testator at a time when he was incompetent to conceive a new will or to resist the persuasion of his family physician; that the supporting evidence given to it by the Brewers is done by them on an understanding that they are to share in the proceeds.

I strongly suspect that there are important phases of the situation which have not appeared; but, having carefully weighed all the testimony as adduced, I have reached the conclusion that, upon the evidence as it stands, the will must be admitted to probate.

If the evidence of Dr. McRae is true, and if that which he states actually occurred, there can be no question of the testator's capacity. According to McRae's evidence, the testator's brain was working, and his initiative and his power of thinking and willing were more than sufficient to enable him to make such a will as this. If the contention of the next of kin is to be supported, it must be supported on the basis that the evidence not only of Dr. McRae but of Mr. and Mrs. Brewer and of the plaintiff Sellers was wilfully false; that they have either manufactured or have so coloured and overstated what took place, as to make it entirely untrue and misleading. If the will now propounded is not the last will of the testator, then it is probable that the will of March, 1916, which gives the whole of the property to George Garniss and Maria Sullivan, would be operative. But Mr. and Mrs. Brewer both swear most positively that they were wholly unaware of the will of 1914 or of the will of 1916, and that they thought (having been so given to understand by the testator) that the will which was in their possession, drawn by Vanstone in 1911, by which their son William received the homestead, was in full force and effect, and that they were unaware of any change until the will now in question was drawn on the 10th August. If that evidence is to be believed, then there was no inducement or basis

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upon which the Brewers could have been expected to enter into any conspiracy or arrangement to procure the making of the will now in question; the fact being that the will now in question is, as compared with the will of 1911 which they thought was in force, more prejudicial to the Brewers than to anybody else. The doctor takes nothing by the will. He has not even had himself appointed executor. It does not therefore appear to me to be reasonable to suppose that they are connected with such an attempt or arrangement.

To uphold the contention of those contesting the will, it would be necessary to find, first, a conspiracy on the part of the five persons, Mr. and Mrs. Brewer, Mr. and Mrs. Sellers, and the doctor; second, the successful carrying out of a complicated plot on the 10th August; and, third, the deliberate perjury of at least four persons at this trial.

The evidence does not warrant me in making these findings.

Judgment will go in the usual form decreeing probate of the will propounded by the executors.

There were so many circumstances of suspicion that I think this litigation was justified; but, save as to the costs of the executors, the costs ought not to be borne by the residuary legatees.

The executors' costs as between solicitor and client will be paid out of the estate; otherwise there will be no costs.

The defendants Maria Sullivan and George Garniss appealed from the judgment of MASTEN, J.

April 29. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

[Hugh Guthrie, K.C., S.-G. Can., for the appellants, argued that the learned trial Judge had disregarded the rule as to the *onus* of proof lying upon a party propounding a will, which is laid down in *Tyrrell v. Painton*, [1894] P. 151. It was argued in that case, as it was in the case at bar, that to find against the will would be equivalent to finding that a number of persons were guilty of conspiracy and deliberate perjury, and that the evidence would not warrant such a conclusion. But the true rule, as was pointed out by Lindley, L.J., in the case cited, is that where the circumstances attending the preparation and execution of a will are such



as raise the suspicion of the Court the party propounding it is bound to adduce evidence which removes such suspicion, and satisfies the Court that the testator knew and approved of the contents of the instrument. This *onus* the plaintiffs failed to satisfy. In addition to the cases cited in the *Tyrrell* case, reference was made to *Adams v. McBeath* (1897), 27 Can. S.C.R. 13; *Fulton v. Andrews* (1875), L.R. 7 H.L. 448; *Murphy v. Lamphier* (1914), 31 O.L.R. 287; *Gross v. Smith* (1917), 13 O.W.N. 170; and, as to adducing fresh evidence on appeal, to *Rathbone v. Michael* (1910), 20 O.L.R. 503; Holmested's *Judicature Act*, 4th ed., pp. 694, 695.

*William Proudfoot*, K.C., for the defendant Joseph J. Sellers, respondent, argued that this was not a case in which new evidence should be admitted, and relied on the judgment of the learned trial Judge as to the will having been executed in accordance with the provisions of the Wills Act. He referred to *Brown v. Bruce* (1859), 19 U.C.R. 35; *Lamphier v. Brown* (1915), 9 O.W.N. 200; *Thomson v. Torrance* (1881), 28 Gr. 253; *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549; *Malcolm v. Ferguson* (1909), 1 O.W.N. 77, 14 O.W.R. 737; *Lloyd v. Robertson* (1916), 37 O.L.R. 498, 28 D.L.R. 192; *Re Wilson Estate* (1914), 19 D.L.R. 698.

*R. Vanstone*, for the plaintiffs, the executors, respondents.

*Guthrie*, in reply.

October 15. MULOCK, C.J.Ex.:—This is an action to establish as the last will and testament of Thomas Garniss, deceased, a certain paper-writing bearing date the 10th August, 1916, whereby he purports to appoint the plaintiffs executors, and, after payment of his debts and funeral expenses, to dispose of the residue of his estate by giving to the plaintiff Sellers \$6,000; to his niece Elizabeth Brewer, \$100; and the remainder to his brother George Garniss and his sister Maria Sullivan, in equal shares.

The defendants Maria Sullivan and George Garniss allege that on the 25th March, 1916, Thomas Garniss made his last will and testament whereby he devised and bequeathed his whole estate to them; that at the time of the alleged execution of the paper-writing in question he was incompetent to make a will; and that, if he executed the same, its preparation and execution were procured by fraud on the part of the plaintiffs.

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The deceased was a bachelor, and died on the 13th August, 1916, at the age of 85 years. He was a farmer, and for several years before his death had resided alone on his farm. His estate at the time of his death was worth between \$10,000 and \$12,000. His brother George and his sister Maria lived in the State of Michigan, and the deceased at irregular intervals paid them visits.

On the 15th July, 1916, the deceased when alone in his house broke the neck of the femur and was unable to move. On the following day Frederick Brewer discovered him lying on the floor, and removed him to his (Brewer's) house, where the deceased remained until his death on the 13th August, 1916. The accident caused a severe shock, the deceased steadily became weaker, and it was necessary from time to time to administer tonic medicines. On the 5th August he had a "weak spell," and on Tuesday the 8th August another, which lasted three or four hours, when it passed away, but he continued to grow weaker until Saturday morning the 12th August, when he became unconscious, dying on Sunday the 13th August without having recovered consciousness. The will in question is said to have been prepared and executed on the morning of the 10th August.

On the 2nd December, 1911, he had his will prepared by his then solicitor, Mr. Vanstone, and by it he devised his homestead farm with farm chattels to William Brewer, son of his niece Elizabeth Brewer, and the residue of his estate to his brother George and his sister Maria Sullivan, and appointed his niece Elizabeth Brewer and her husband, Frederick Brewer, executors. This will he duly executed in the presence of two witnesses.

Subsequently he had another will, bearing date the 20th February, 1914, prepared by his then solicitor, Mr. Sinclair, and by it he devised and bequeathed the whole estate to his brother George and his sister Maria Sullivan, and appointed Mr. Sinclair his executor, and he duly executed this will in the presence of two witnesses and took it to his home. There he mislaid it; and, fearing that it was lost, he called upon his solicitor, Mr. Sinclair, and instructed him to prepare a new will of the same tenor as the mislaid one. Mr. Sinclair had a copy of the mislaid will, and followed its language strictly in drawing the new will, except as to its date, dating it the 25th March, 1916, evidently the day of its

execution. The testator duly executed it in the presence of two witnesses, and left it in Mr. Sinclair's custody for safe-keeping.

The plaintiff Sellers alleges, as is more fully set forth hereafter, that on several occasions down to the month of June, 1915, the testator had expressed a desire to bequeath him \$6,000 and wished Sellers to prepare a will to that effect. But, unless this story of Sellers is true, it would seem that as late as the 25th March, 1916, the testator adhered to the intention manifested in his will of the 20th February, 1914, to devise his whole estate equally between his brother and sister.

The plaintiffs allege that on the 10th August, 1916, the testator executed as his last will and testament the paper-writing in question, and they ask to have the same established as such. In view of the conclusion which I have reached as to the proper disposition of this appeal, it is inexpedient to analyse minutely the conflicting evidence.

The learned trial Judge in his able judgment says: "The defences are: (1) that the will was not duly executed in accordance with the provisions of the Wills Act; (2) that, at the time of the alleged execution of the document sought to be established in this action, Thomas Garniss was incompetent to make a will, and did not understand the nature and effect of the document signed; (3) that the preparation and execution of the document submitted for probate was procured by the fraud and undue influence of the plaintiff Sellers and others associated with him. The three contentions raised by the contestants, and noted above, dovetail into each other and stand or fall together, so that they cannot well be considered separately in reaching a conclusion."

Then, after carefully reviewing and dealing with the evidence, he says: "To uphold the contention of those contesting the will, it would be necessary to find, first, a conspiracy on the part of the five persons, Mr. and Mrs. Brewer, Mr. and Mrs. Sellers, and the doctor; second, the successful carrying out of a complicated plot on the 10th August; and, third, the deliberate perjury of at least four persons at this trial. The evidence does not warrant me in making these findings. Judgment will go in the usual form decreeing probate of the will propounded by the executors."

When the Court is asked to establish a will, if it appear that it was prepared under circumstances which raise a well-grounded

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suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed. This issue should be tried prior to that of fraud; and, if it is determined against the will, the will cannot stand, and it becomes unnecessary for those opposing it to shew fraud. As stated by Parke, B., in *Barry v. Butlin* (1838), 2 Moore P.C. 480, at p. 482:—

“The rules of law according to which cases of this nature are to be decided do not admit of any dispute, so far as they are necessary to the determination of the present appeal: and they have been acquiesced in on both sides. These rules are two: the first that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.”

In *Tyrrell v. Painton*, [1894] P. 151, 157, 158, Lindley, L.J., says:—

“The rule in *Barry v. Butlin*, 2 Moore P.C. 480, *Fulton v. Andrew*, L.R. 7 H.L. 448, and *Brown v. Fisher* (1890), 63 L.T. 465, is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will. Here the circumstances under which the will of the 9th was prepared and signed are such as to cause the gravest suspicions. The doubt which they raise is not, to my

mind, removed by the evidence on behalf of the defendants, and I should go further if it were necessary. Were this case tried by a jury, if the Judge were to direct them that the issue they had to try was whether the plaintiff had proved that the will of the 9th was obtained by fraud, I should say that it was a misdirection. The question for the jury would be, did the testatrix know and approve of that will, and the jury should be told that it was for J. Panton to prove that she did. The question, then, is whether we ought to reverse the decision under appeal, or to direct a new trial."

Applying these rules to the present case, the first question is whether the will now propounded was prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator. By that instrument he gives \$6,000, being more than one half of his estate, to Sellers, who is related to him by marriage only, being the husband of a niece, one of nine children of a deceased brother.

Sellers in his evidence purported to explain the circumstances leading up to the making of the will. According to his evidence, it appears that in the month of June, 1915, at the testator's request, Sellers prepared his will, giving to Sellers \$6,000, and that the testator signed it, but not in the presence of any witnesses.

Sellers' house was about a mile distant from the testator's.

In answer to the question, "What kind of a man was the testator so far as business ability and vigour?" Sellers answered, "He was a strong, vigorous man." Sellers swore that in the spring of 1915 the testator asked him to draw up "that will," but he put him off, telling him, "I don't want to draw it," and to get some lawyer to draw it. "And he says, 'You can draw it up as well as any lawyer can.' I still put him off. I didn't want to draw it or have anything to do with it, till the 15th he mentioned it two or three times, spoke about in regard to his dying without a will, and he said if he did go sick he would have made a will. At last on the 15th or 16th I made the will. "Q. Of June? A. Yes."

He swore that the will was drawn in the house of the testator and left with him; that in "a few months' time" he brought it to Sellers to keep. There were no witnesses—the reason, according to Sellers' evidence, being that he (the testator) did not want any

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one to know that he was making that will. Sellers says he suggested witnesses, and the testator did not want witnesses for fear somebody got to know that he had made it. Later on in his examination, Sellers says: "He came back in about a month's time as near as I could judge, a month's time he came back to me and told me to put it in safe-keeping, he said he didn't want it around for fear one thing he didn't want anybody to see it."

Sellers admits having kept secret the circumstances of this paper from every one, including his own wife, from the time of its making until the night of the 9th August, 1918, when in his evidence he leaves it to be inferred, but he does not state it, that he mentioned it to Mr. Vanstone. On this point it is to be observed that Frederick Brewer was present during the whole interview between Sellers and Mr. Vanstone, and swore that the alleged will of the 15th June, 1915, was not produced or mentioned; and the fair inference is that Sellers made no reference to its existence.

I now refer to the evidence of Mrs. Brewer, who appears to have taken an active and interested part in bringing about the condition of affairs which resulted in Dr. McRae preparing the will in question. She was a niece of the deceased, and the mother of William Brewer, to whom the deceased by his will of 1911 had devised his homestead, and she swore that two weeks before his death the testator informed her that she would take the homestead by his will; that the will to that effect was in Mr. Vanstone's office; that "it was as good a one as was ever made," and that he had a little "fixing" to do, and he wanted Sellers to go to Wingham to get it done.

She also swore that on Sunday evening, the 6th August, when in a room adjoining the bedroom of the deceased, she overheard a "talk" between him and Sellers, wherein reference was made to an unattested will, and that Sellers was to go to Mr. Vanstone and ascertain whether witnesses were necessary, and if so it was to be "fixed."

If she believed the statement of the deceased that she was to take the homestead, she doubtless assumed that she was interested in the execution of the will referred to.

Ever since the accident the deceased had been losing strength, and on the previous day had a "weak spell," and it is difficult for me to believe that on the following night he took any substantial



part in the conversation as to the disposition of his estate. Still Mrs. Brewer swears to overhearing a "talk," and from it she learned either from what Sellers or the deceased said that there was a will that might have to be "fixed."

Then, on her husband's return from Mr. Vanstone's, she doubtless learned that an unattested will was invalid.

On the morning of Thursday the 10th August, she telephoned urgently for Dr. McRae to come to her house, and on his arrival she was told, he declares, that the deceased had made several wills; that Sellers had one in his possession, and that the deceased wished Dr. McRae to prepare his will. Thereupon McRae, without any request from the deceased, telephoned Sellers to come to the house and bring the will in his possession. Sellers did so promptly.

Sellers swore that two nights before the 10th August, he was in conversation with the deceased, no one else being present, when the deceased spoke "about the will not being witnessed, and he says, 'I would like you to see Mr. Vanstone and see if it would stand without witnesses,' and Mr. Fred Brewer telephoned me the night of the 9th to know if I could go to Wingham. He wanted to see Mr. Vanstone." Accordingly the two went together to Mr. Vanstone's, Brewer ostensibly to deliver an order to Mr. Vanstone, doubtless also for the purpose, on his wife's account, of learning Mr. Vanstone's opinion in regard to the validity of an unattested will, and Sellers, also desiring to have Mr. Vanstone's opinion on the same subject. Both men then learned that an unattested will was of no force. Sellers did not at this interview with Mr. Vanstone have the will with him, nor on the way home did he tell Brewer of its existence, but he stated that he would be at Brewer's house the next morning. He further swore that on arriving there on the morning of the 10th August, he went at once into the bedroom of the deceased, and there, in answer to inquiry from the deceased, said that he had seen Mr. Vanstone and that the will "won't stand law," and that the deceased then said, "Give it to Dr. McRae."

There is no evidence that the deceased had ever discussed his affairs with Dr. McRae or had contemplated requesting him to prepare a will or that Dr. McRae, even if requested, would have been willing to do so, and it is strange that under such circum-

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stances the deceased should have instructed Sellers to "give it to Dr. McRae."

No other person was present at this alleged conversation, but, Dr. McRae then entering the room, Sellers handed to him the unattested paper and retired to the kitchen, leaving McRae alone with the deceased, and he states that after a while Dr. McRae came out of the bedroom, having then in his possession both the paper of the 15th June, 1915, and the will which he had just had prepared, which was apparently executed, and asked Mr. Kearney, one of the witnesses, if he was satisfied that the old man was in his right mind, and he said he was.

Dr. McRae swore that he was at the Brewers' house on the morning of the 10th August, and that Mrs. Brewer "spoke to me regarding his will, Mrs. Brewer did, and gave me the impression that he wanted to see Mr. Sellers in regard to the will that he had drawn." Having entered the room of the deceased, "I" (Dr. McRae) "told him he hadn't long to live, and that if he had any business to attend to, he had better attend to it. He said, 'There's nothing to do except the will.' I said, 'I understand you have made five or six wills, which will do you want to stand or what do you want to do about your will?' And he says, 'The will I made on Sellers,' or 'with Sellers,' I am not positive, I can't swear the exact words, but he referred to a will, anyway, that Sellers had. And I said, 'Are you sure that is the will you want to stand?' And I said, 'I will read it over to you just to be sure.'" He says he then read it, and the deceased said that was the will, "all but \$100 to the woman here," meaning Mrs. Brewer. He says that the deceased requested him to prepare the will; that he went into the kitchen, where were Sellers and Mr. and Mrs. Brewer, and requested them to send for a witness; that he then returned to the bedroom and prepared the will, and just as it was finished the witness Kearney appeared, and Dr. McRae said: "This is his will, and I am going to read it over to him to see if he is still of the same opinion that he was when I spoke to him before. This will I have re-written according to his request, now I am going to read it over to him." "So I did so."

Dr. McRae alleges that the deceased then said: "Now just that one point there, about my expenses in regard to my sickness. Does that mean they won't be paid until after I am dead?"

And he (Dr. McRae) said, "Demise means death." The deceased said: "Now that is all right." "And I turned to Mr. Kearney, and I says, 'If you are satisfied that this man is in his right mind and knows what he is doing put down your name there,' and I shewed him where."

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Then Dr. McRae came into the kitchen, having with him the paper of the 15th June, 1915, and, in the presence of Sellers, Mr. and Mrs. Brewer, and Kearney, he put it in the kitchen stove, where it was burned, and, of his own motion, without any request from the testator, took away the newly executed will.

Dr. McRae was, at the time of the preparation of this will and for several years previously had been, Sellers' family physician.

Following are extracts from Dr. McRae's cross-examination:—

"Q. And then I understood you took that into the sitting-room and copied it out in the shape in which the will appears now? A. Yes.

"Q. Then is that the will you drew? A. Yes, sir.

"Q. And, if I understood you right, that is a copy of the document you destroyed, with the exception of the dates and the witnesses? A. Yes, and \$100 to Mrs. Brewer. That is a copy of what was in it, but in different language. It is not in the same language."

Dr. McRae was not experienced in drawing wills, having only drawn one before, and, he says, made a mess of it, and it is a peculiar circumstance that he happened to have with him at the time a form of a will issued by the Western Trust Company.

According to Kearney's evidence, when he entered the bedroom the deceased was lying on his back in bed and, Kearney thinks, breathing heavily. Kearney approached the bedside and said, "Good morning, Mr. Garniss," or words to that effect, but Garniss made no reply. Then Dr. McRae told him it was Kearney, but the only sound uttered by the dying man was "Oh! Ay!" They did not shake hands. He was, Kearney says, looking very ill. Dr. McRae in his evidence swore that many other things were said by the deceased after Kearney entered the room. He admitted that before the trial he had reviewed with Kearney the events which occurred in their presence in the bedroom. When asked on his cross-examination whether this was done for the purpose of court to-day, he answered, "Not for the purpose of



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court." Counsel pressed him, saying: "For the purpose of brushing up his memory or getting his memory like yours. Then why did you do it if it were not for the purpose of the court? To which he answered, "Well, I suppose it was for the purpose of remembering things." Dr. McRae's statement, that is, as to reviewing with Kearney the happenings in the bedroom, was, I think, lacking in candour, and was open to the suspicion that he was endeavouring to influence Kearney's recollection of the events.

The following is an extract from Kearney's evidence on cross-examination as to the alleged signing by the deceased:—

"Q. Now I want to get exactly what was done when Mr. Garniss signed the will. As you say, he was lying flat on his back, was he not? A. Yes, sir.

"Q. His arms spread out? A. I think so; I couldn't swear positively to that.

"Q. A man in that position couldn't sign, could he? A. Well, of course, I don't know.

"Q. Well, now, I want your recollection, Mr. Kearney, because it is a very important point? A. Oh, yes.

"Q. A man in that position couldn't sign, could he? Do you remember Dr. McRae taking the pen and making the mark? A. Oh, yes, I remember when they made the mark.

"Q. Do you remember Dr. McRae taking the pen and making the mark? A. Well, of course, Tom had hold of the pen.

"Q. Who put it in Tom's hand? A. Dr. McRae did, I think.

"Q. And could Tom hold the pen himself? A. Well now, I couldn't swear he couldn't.

"Q. Well now, this is critical. Wasn't his hand lying there limp so that he couldn't hold the pen? A. Oh, yes, it seemed like that, but of course, whether—

"Q. Then did Dr. McRae take his hand that way and make a mark with it? A. I would think so, steadied his hand.

"Q. The man could not hold the pen himself, could he? A. Steadied his hand.

"Q. Steadied his hand is what you talked about yesterday. But I am trying to get what really took place. That is the word the doctor used; that is what you talked about yesterday, didn't you? A. I don't think that was mentioned yesterday.

"Q. He was lying there limp, with his arms spread out, and

couldn't hold the pen, could he? A. It would be pretty hard for me to swear whether he could or not.

"Q. Well, he didn't hold the pen, did he? A. I wouldn't know whether he did or not.

"Q. Then you cannot swear whether he actually held the pen or not? A. Myself?

"Q. Yes. A. No; I could not positively swear to that.

"Q. Then, if my instructions were right—you can put me right on this—the doctor placed the pen in his hand, and the doctor made the mark to the paper in the presence of the three of you: is that correct? A. Well, that is the way it looks to me, you know: he made the mark.

"Q. Now did he at any time when you were in the room, up till the time that the mark was made to that will, did he tell the doctor to write for him? A. In my presence?

"Q. Yes. A. No, sir.

"Q. Did he give the doctor any instructions to put his name to the will? A. Not that I heard.

"Q. But the doctor actually held the pen and put the mark there, did he not? A. Well, the two of them. He held the pen in Tom's hand, and he held Tom's hand.

"Q. Now, Mr. Kearney, I think you are trying to tell the truth; don't laugh over it, it is solemn. There wasn't another word spoken in that room save what you have told me, was there? A. Between Tom, you mean?

"Q. Between the old gentleman and you and the doctor? A. No, no.

"Q. Not another word? A. No.

"Q. There was no discussion as to who was to be executor? A. Oh, no, not in my presence.

"Q. There was no discussion about Sellers in your presence? A. Only that time I told you, you know.

"Q. Now wait a minute. I want to get this right. You talked that part over with the doctor yesterday? A. I mind that positive.

"Q. Do you mind talking that over with the doctor yesterday? A. I don't know whether that was mentioned with the doctor yesterday.

"Q. About your being a witness, and Sellers being executor? A. I remember that positively, oh yes.

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"Q. You know that the old man was very far gone when this document was executed? A. Oh, yes, he was pretty weak-looking.

"Q. And you know that when you came in he didn't say any more than 'Oh, ay'? A. That is all I remember him saying.

"Q. And he didn't speak to you again after you went out, did he? A. No, sir.

"Q. Not a word? A. No, sir.

"Q. Do you think he knew you? A. I did; I think he knowed me. I said after, at the time, I remarked that at the time when we went in.

"Q. But you were not very sure, were you? I think, Mr. Kearney, in what you say you are trying to tell what is right, but honestly, do you think he knew you at all? A. Well, I think he did, but for me to swear positively to it, it would be pretty hard, but I can swear I think he did.

"Q. He wasn't able to carry on a conversation, or anything of that kind? A. Oh, no, I wouldn't say that: at least I didn't hear him.

"Q. And the whole thing was practically done by Dr. McRae? Whether right or wrong I am not discussing, but the whole thing was practically done by Dr. McRae, wasn't it? A. Oh, yes, practically.

"Q. And you just put your name where he told you on the will? A. Yes, sir.

"Q. And the doctor signed his name? A. Yes.

"Q. And in your own heart, and on your oath, do you think the old man knew what he was doing? A. I certainly would have to swear I think he did.

"Q. But his condition was such that he didn't know you? A. I think he did. You know I would have to swear I think he did.

"Q. You don't feel any way confident at all about it? A. Well, I think he knowed me.

"Q. You think he knew you? A. Yes.

"Q. You knew him, of course? A. Yes, of course.

"Q. And you think he knew you? A. Yes.

"Q. You couldn't pledge your oath to that? A. Oh, no; only I think he did.



"Q. You wouldn't have any confidence in any one in a condition like that? You were sent for to act as a witness. Who went for you? A. Charles Brewer.

"Q. He is a son of Mrs. Brewer? A. Yes.

"Q. And, being a neighbour, you came to do what you could? A. Yes. I was out in the pea-field pulling peas.

"Q. To witness the will? A. Yes.

"Q. Now it was a pretty solemn occasion; the old man lying there at the point of death, and now you are under oath. Do you think that old man knew what he was doing? A. I would certainly have to swear I think he knew what he was doing, to the best of my knowledge.

"Q. Had he any memory, do you think? A. Oh, well, I couldn't swear to that.

"Q. You couldn't swear that he had any memory? Have you told us all that took place in the room? A. Yes, sir, all that took place, I think.

"Q. And there is nothing took place that you have not told us? A. No, sir, that is right; nothing.

"Q. Mr. Kearney, after you signed the will, as a witness, I don't mean in connection with this court, but after you signed the will as a witness, when you went away you had doubts in your mind then, hadn't you, from what you saw in that room that day; you had doubts in your mind? A. I knew he looked pretty sick, sure.

"Q. And you had doubts in your mind as to whether he knew much of what he was doing, didn't you: after you left the house that day? And on your oath haven't you doubts now? A. Well, I certainly think he knowed——

"Q. Haven't you any doubt on that subject? A. No, I can't say for that.

"Q. Didn't you that day say to anybody that you didn't believe he knew what he was doing? A. Oh, no, sir, I didn't.

"Q. You didn't say that to anybody? A. No, sir.

"Q. I don't mean in the house; but after you left there? A. Oh, no, I didn't. No, no, I didn't.

"Q. You wouldn't like to make a will under those circumstances for yourself, would you? Do you know what was in the will, hearing it read? A. Oh, yes, sir.

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"Q. You know Mr. Sellers gets \$6,000 under the will? A. Yes.

"Q. You never heard of him being friendly with the old man, did you? Now did you, honest? A. Oh, well, of course, I haven't been living much over among them.

"Q. Three years is a good long time. A. Mr. Garniss and I—you know he was a bachelor—and we didn't neighbour very much.

"Q. You didn't know Mr. Sellers was very friendly? A. I knowed Mr. Sellers used to visit him pretty often, and get wood for him.

"Q. You have known him do that, have you? A. Oh, yes.

"Q. Did you know of his visiting with his brothers and sisters in Detroit? A. Mr. Garniss visiting?

"Q. Yes. A. He visited there before I come over.

"Q. You remember a brother from Detroit coming and spending a summer with Mr. Garniss? A. Yes; that is after I come there.

"Q. This brother from Detroit? A. Yes.

"Q. And were you over at the time to see him? A. No, never was at his place while his brother was there. Not on the place; of course I live right near it.

"Q. What time of the day was this will signed? A. I could not say positively, but I would say some place around ten o'clock, as near as I can remember, in the forenoon. You know some place near there.

"Q. Are you a friend of Sellers? A. No, sir, I am not.

"Q. Did you hear that they had, just after the will was signed, sent a telegram to Detroit: 'Come at once if you want to see your brother alive?' A. Well, I might have heard it; I don't remember anything about it at all.

"Q. You don't know anything about it at all? A. No, sir.

*Re-examination by Mr. Proudfoot:—*

"Q. Was this the only occasion on which you saw Mr. Garniss during his illness? A. The only time I saw him during his illness?

"Q. Yes. A. No, sir. The wife and I was down one Sunday evening just after he got hurt, down to Brewers', and I was in the room and saw him then.

"Q. And at the time he got hurt, I understand he was living in his own house? A. Yes.

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"Q. And after the injury he was taken down to Brewers'?"  
A. Yes, sir.

"Q. And he remained there from that time up to the time of his death?" A. Yes, sir.

"Q. Had you any very extensive acquaintanceship with him?"  
A. No, sir, not any.

"Q. Did you neighbour with him at all?" A. No, I never neighboured with him. He used to come up odd times, and I have known the woman to give him some cooking, and that. He wasn't farming himself.

"Q. He was not farming himself?" A. No, sir.

"Q. Who worked the land for him?" A. It was rented for pasture, all seeded down.

"Q. So the only part of the premises he used was the house and probably the orchard?" A. Yes, just around there.

"Q. And you say you went over there with Charlie Brewer?"  
A. Yes, sir.

"Q. And when you went into the room you had this little conversation which has just been mentioned by you. The doctor, you also say, read the will over. Did he read it clause by clause?"  
A. He did, very distinctly.

"Q. Very distinctly?" A. Yes, sir.

"Q. And after reading it over in that way, the pen was put in the hand of Mr. Garniss, and the doctor, you say, steadied it?"  
A. Yes, sir.

"Q. And that is the way the mark was made?" A. Yes, sir.

"Q. And then after this mark was made you signed, and then the doctor signed?" A. Yes, sir; that is correct.

"Q. And after you got through did you say 'Good-day' or 'Good-bye' to him, and walk out of the room?" A. I just walked out of the room; I didn't speak to him, no, no."

This evidence of Kearney's casts very grave doubt both as to the testamentary capacity of the deceased and also as to whether in fact the deceased signed the paper now propounded as his will. He swore that no conversation with the deceased occurred; that when McRae read the will the deceased said, "Joe Sellers, executor," that that was the only time there was anything mentioned except that, on Dr. McRae referring to another clause in the will, the deceased said, "That means after I die."



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In many respects Kearney contradicts McRae. Dr. McRae said that, after the will was ready for execution, "I took that will in my hand, walked into the bedroom with Kearney behind me, and I says, 'Tom, this is Mr. Kearney, he has come to witness your will,' and he looked up and says, 'Jim Kearney,' and he says 'Sellers is executor,' and I said, 'I know Sellers is executor, but you have got to have a witness to your signature,' and he says 'Oh, yes, that is all right.'"

According to Kearney's evidence, the testator did not make any of these statements except it be "Joe Sellers, executor," and that was said not, as McRae puts it, before, but after the reading of the will to him, and may have been an expression of surprise. It is improbable that, on Kearney entering the bedroom and before the testator knew the full particulars which McRae had been writing, he as a matter of information made the bald statement "Joe Sellers, executor."

Apparently Dr. McRae was of the opinion that the testamentary capacity of the deceased was open to doubt, for he says he said to Kearney, "If you are satisfied that this man is in his right mind and knows what he is doing, put down your name there."

The will in question is a development of the unattested paper of the 15th June, 1915, and it is unfortunate that Dr. McRae burnt that paper without permitting any one to see it. The only other person to speak as to its contents and condition is Sellers, who drew it, and his conduct in preparing and keeping it secret from every one until the 10th August, 1916, appears to me a suspicious circumstance.

The testator in 1911 had a will prepared by his then solicitor, Mr. Vanstone, and knew that there were two subscribing witnesses to it.

Again in 1914 he had a second will prepared by his then solicitor, Mr. Sinclair, and there were also two subscribing witnesses to this latter will, and I am unable to believe that with this experience he was of opinion that witnesses to a will were unnecessary, or that he so expressed himself to Sellers.

Then Sellers' explanation that he kept the unattested paper secret, at the request of the deceased, is unconvincing. According to his own evidence, the testator was a man of strong mentality and independent character.

There is another circumstance which discredits the story of that paper. The will of the 20th February, 1914, whereby the testator had devised his whole estate to his brother George and his sister Maria Sullivan in equal shares, was in full force when, according to Sellers' evidence, the deceased was appealing to Sellers to draw his will. In connection with such appeals Sellers says that the deceased expressed himself as apprehensive that he might be taken sick and die intestate; that Sellers first refused to draw the will and advised the deceased to have a solicitor, but his answer was that he could do it as well as a solicitor. As the deceased had already twice employed solicitors for such purpose, it is singular that on this occasion he should have adopted the peculiar course of entrusting the task to the chief beneficiary, a layman.

Another circumstance also makes it difficult for me to accept Sellers' evidence as to the unattested paper representing the deceased's testamentary wishes. On the 25th February, 1916, the testator caused his solicitor to prepare a will of the same effect as the mislaid one of the 20th February, 1914, and he duly executed it in the presence of two witnesses, making no mention to his solicitor regarding the unattested paper of the 15th June, 1915. Apart from Sellers' evidence, there is nothing going to shew that the testator's intentions as manifested by his will of the 20th February, 1914, had undergone any change. When instructing his solicitor to prepare the will of the 25th February, 1916, he spoke of the will of February, 1914, not as revoked, but as mislaid. If he were conscious of having revoked or attempted to revoke it by the "Sellers" will, he would in all probability have mentioned the circumstance to his solicitor. This he did not do, but simply desired a new will, namely, to give his whole estate to his brother and sister.

These various circumstances make it impossible for me, on the uncorroborated evidence of Sellers, an interested party, to accept his story that the deceased intended to give the bulk of his estate away from his brother and sister to Sellers, who, so far as appears, had no claim upon his bounty or place in his affections.

Mrs. Brewer was apparently interesting herself in bringing about the perfecting of the supposed will in her favour to the extent of the homestead, but in fact only takes \$100 by the will

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drawn by Dr. McRae. If that will does not stand, she takes nothing. To the extent of \$100 she is an interested party.

I am not satisfied that the testator, if he did sign the unattested document in question, intended it to operate as a will. Nevertheless it was made to play an important part in the circumstances which led up to the alleged will of the 10th August.

If in preparing the testator's will Dr. McRae was acting honestly, the unattested document, if he believed it genuine, would have doubtless influenced him by leading him to assume that it represented the testator's intentions, and would probably have caused him to be less careful in ascertaining them from the lips of the deceased.

Dr. McRae prepared the will giving the \$6,000 to Sellers without instructions from the deceased and without knowing from him personally what his wishes were, and I am not satisfied that the deceased ascertained from the reading of the will by McRae in Kearney's presence the full nature and effect thereof. In fact it is doubtful if he executed the will at all.

At the time of the alleged execution of the will, the deceased, according to Kearney, was lying flat on his back, breathing heavily; apparently he did not recognise Kearney; his arms were spread out on the bed; Dr. McRae put the pen in the deceased's hand. The hand was lying so limp that the deceased could not hold the pen. Dr. McRae took hold of the deceased's hand and made a mark with it.

If Kearney's evidence is to be believed, and the trial Judge accepted him as a truthful witness, whilst the pen was held in the deceased's hand by Dr. McRae, if a mark was then made by the pen, the directing mind, I think, was Dr. McRae's, and not that of the deceased.

In his able judgment the learned trial Judge says: "The demeanour and evidence of Dr. McRae struck me as being not quite as spontaneous and frank and complete as would have been expected from a professional man in his position, but in making that observation I am very far from discrediting his testimony."

It was stated by counsel before us that before judgment both plaintiffs moved for leave to adduce further evidence, but that the motion was refused. On the appeal affidavits were filed to the effect that since the trial the witness Kearney had made state-



ments inconsistent with his statement at the trial, but this Kearney denied.

The suspicions to which the case is open must have made it difficult for the trial Judge to reach a conclusion, and fully justified his observation, "I strongly suspect that there are important phases of the situation which have not appeared."

The evidence shews that the alleged will was prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the deceased. The *onus* was on the plaintiffs to remove that suspicion by satisfying the Court that the document propounded is an expression of the free will of a competent testator. That suspicion not having been removed, the onus has not been discharged, and those opposing probate were not bound to establish fraud.

The first mentioned issue was not in fact tried, the judgment dealing with the issue of fraud only. There may be an absence of fraud, but there are such suspicious circumstances that the conscience of the Court is not satisfied that the paper propounded is a correct expression of the testator's intentions.

For these reasons, I am of opinion that the judgment should be set aside, and a new trial ordered, if desired by the plaintiffs or either of them, or by Mrs. Brewer; otherwise the action should be dismissed without costs, except those of the executors, which are to be paid out of the estate.

The parties may have a month in which to decide whether a new trial is desired.

CLUTE, J., agreed with MULOCK, C.J.Ex.

SUTHERLAND, J., agreed in the result stated by MULOCK, C.J.Ex.

RIDDELL, J.:—I have had the opportunity of reading the elaborate judgment of the Chief Justice on this appeal.

In view of the fact that we are here concerned with the estate of a deceased person, we should scrutinise the evidence with much care. Having read the evidence carefully and having read also the judgment of my Lord, I think we should not give any opinion on the credibility, or otherwise, of the evidence: but that, in view of the new evidence now adduced, which goes to the credit of an important witness, we should direct a new trial, costs of this appeal and of the former trial to be in the cause.

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I think, on the case as it stands, bearing in mind the findings of the learned trial Judge, I should not reverse the judgment: but the whole case will be open on the new trial.

KELLY, J.:—The condition of things revealed in the evidence is sufficient to excite the suspicion of the Court as to whether the document offered for probate is the last will of a free and capable testator; the *onus* of removing that suspicion rests upon those propounding the will.

The trial Judge's review and analysis of the evidence, while otherwise most exhaustive and complete, does not determine whether that *onus* has been discharged; the judgment does not expressly deal with that aspect of the case. It is essential that that question should be first disposed of; it should not be left in doubt.

There should, in my judgment, be a new trial, in which that and any other issues involved may be fully tried and determined. If the whole case is to be, as I think it should be, retried, I desire not to express an opinion upon any of the matters alluded to in the reasons for judgment or in the evidence already taken, beyond this, that in dealing with the assets of the estate of a deceased who can no longer be appealed to or speak for himself in explanation of the circumstances surrounding the disposition he is said to have made of his affairs, every available proper means of arriving at a conclusion as to whether the document in issue is really his will—the will of a capable testator—and the expression of his untrammelled and uninfluenced intention, should be exhausted. Here there is the added fact that affidavits have been made by two persons alleging that since the trial statements were made in their presence by an important trial-witness which are quite inconsistent with material parts of his evidence at the trial.

I desire not to be taken as laying down a general rule that contradictions so made of trial evidence are sufficient in all cases to justify the granting of a new trial; but where suspicious circumstances connected with the making of a testamentary document have not been fully cleared up by those propounding it, affidavits such as I refer to afford an added reason for sending the case back for retrial.

*The plaintiffs desiring a new trial, an order  
was made accordingly.*

## [APPELLATE DIVISION.]

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*Insurance (Accident)—Total Disability Claim—Cause of Disablement—"Accident"—Assault—Heart-disease—Probability of Previous Existence—Absence of Knowledge of Assured—Insurance Act, R.S.O. 1914, ch. 183, sec. 172 (1)—Change of Occupation—Materiality—Sec. 156 of Act—Renewal of Policy—Terms of—Attempt to Introduce New Term in Renewal Receipt—Application for Insurance—Findings of Trial Judge—Appeal.*

By a policy issued by the defendants, dated the 17th June, 1914, the plaintiff was insured against "loss resulting from bodily injuries effected directly and independently of all other causes through accidental means, and as the direct result of some cause not attributable to the assured's state of health." The policy was to run for 12 months, and was subject to renewal "by mutual consent from term to term thereafter by payment of the premium." On the 10th June, 1915, it was renewed for one year from that day, the premium being paid and a receipt therefor given by the defendants, which stated that "this renewal receipt is issued subject to all agreements, conditions, and provisions of the said policy . . . and the insured, upon the acceptance of this renewal, makes the further statement that the warranties in the original application are true and complete at this date, and that the hazard at this date is no greater than or different from that of the hazard at the date of the policy." In the application, the plaintiff agreed that the warranties contained therein were the basis of the insurance. In warranty 4 he stated his occupation as "real estate agent." Warranty 11 was: "The class of risk under my occupation is agreed to be preferred according to the company's classification of risks, and I agree that for any injury received in any occupation or exposure classed by the company as more hazardous than that above stated, I shall be entitled to recover only such amount as the premium paid by me would purchase at the rate fixed for such increased hazard." The plaintiff was, as he stated, on the 17th June, 1914, a real estate agent; but, when the policy was renewed in 1915, he had become a drover. On the 15th October, 1915, in a fight with one A., he sustained bodily injuries which wholly and permanently disabled him. After the accident, he was found to be suffering from a disease of the heart called "auricular fibrillation." Members of the medical profession called as witnesses by the plaintiff at the trial of this action, upon the policy, testified that the condition of the heart was caused by the strain to which it was subjected in the fight, and could be thus brought about even in the case of a heart normally sound; but they admitted that generally a condition of auricular fibrillation occurs in cases of hearts not previously healthy. Those called by the defendants maintained that the condition of the heart found to exist was consistent only with the assumption of some previous infection of the heart. If there was a previous infection, however, the plaintiff was not aware of it:—

*Held*, affirming the finding of the trial Judge, that the disability from which the plaintiff suffered began on the 15th October, 1915, and that previously he had enjoyed good health; and, even if his heart was affected before that date, without his knowledge, the disablement resulted "from bodily injuries effected directly and independently of all other causes through accidental means, and as the direct result of some cause not attributable to the assured's state of health."

*Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A.C. 592, applied and followed.

*Held*, also, that the finding of the trial Judge that the plaintiff was not the aggressor in the fight, but was assaulted by A., was warranted by the evidence; and the plaintiff's injuries were thus effected by accidental means.



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*Per CLUTE, J.*:—Upon the proper construction of sec. 172 (1) of the Insurance Act. R.S.O. 1914, ch. 183, the injuries sustained by the plaintiff from the assault upon him by A. came within the definition of "accident" in that enactment.

*Held*, also, that the plaintiff's change of occupation from a less to a more hazardous one, without disclosure of it upon the renewal of the policy, did not avoid the policy. The change was not material to the risk; and the plaintiff's injuries were not caused by anything connected with his occupation of drover.

Section 156 of the Insurance Act considered.

*Per CLUTE, J.*:—Sub-section 3 of sec. 156 refers to a misrepresentation in the original application, not in the application to renew.

The attempt to introduce a new term in the renewal receipt was ineffectual, because the renewal did not constitute or create a new policy, and sec. 156 (1) provides that all the terms and conditions of the policy shall be set out on the face or back thereof.

Judgment of LENNOX, J., directing that the plaintiff recover upon the policy, affirmed.

AN action upon a policy of accident insurance.

The action was tried by LENNOX, J., without a jury, at a Toronto sittings.

*T. N. Phelan*, for the plaintiff.

*D. L. McCarthy*, K.C., and *A. W. Langmuir*, for the defendants.

January 10. LENNOX, J.:—I find that prior to the 15th October, 1915, the plaintiff enjoyed good health to a degree permitted to few to enjoy, and that, judging from what is shewn as to his manner of life and the physical efforts he occasionally made, and succeeded in, he was at the time he effected the insurance in question and its renewals—having regard to his age, of course—to all appearance, and as far as he and people associating with him knew, a healthy, sound, and capable man.

I regard the evidence of the plaintiff and his daughter as truthful and trustworthy.

I am satisfied that the facts and circumstances they depose to relating to the plaintiff's doings and general condition of health, in so far as they knew or could judge, are reliable. I think the plaintiff endeavoured to give and in the main succeeded in giving a substantially accurate account of his condition, sufferings, and doings subsequent to his encounter with Atkinson, and that, if it be a fact—and I will deal with this later on—that when the plaintiff effected the insurance and renewals in question he was affected by any incipient or organic disease, it had not made itself manifest and was not known to him or his daughter, or to his

partner in business, or presumably to Dr. Sproul, or to any one, so far as is shewn: and up to that time, and thereafter up to the 15th October, he had no premonition of or reason to suspect the existence of heart trouble of any kind, or any impairment of power attributable to that cause.

It follows, if I am right—whether it becomes material or not—that in effecting and continuing the insurance he was not guilty of bad faith, intentional concealment, or conscious misrepresentation as to his condition or state of health.

The professional or opinion testimony in this case was commendably qualified, reserved, and moderate, on both sides; but, while I entertain the sincerest respect for the very eminent professional opinion put in evidence by the defence, and, in some cases, and in the absence of facts and circumstances that speak for themselves, I might regard it as conclusive or nearly conclusive, yet the train of practically undisputed facts and circumstances in this case (for it matters not at this point who was the aggressor) and the sequence of events before and after the 15th October, are, to my mind, so distinctly opposed to the theoretic possibilities—or abstract probabilities—set up by the defence, that I am definitely of the opinion, as a conclusion of fact, that the disability from which the plaintiff is suffering began on the 15th October, 1915; and, whether provoked or unprovoked, the origin and cause of it was the manner in which he was treated and handled by the witness Atkinson on that occasion.

I do not accept it as true that Atkinson ever doubted the outcome of the encounter or that he ever even gave heed to the plaintiff's boasts, if indeed the conversation ever occurred, nor do I believe that the plaintiff was the aggressor. The probabilities are all the other way. "Blow for blow" without time for reflection, I can understand. But, even if it were true, and I am not of that opinion, that the plaintiff began the assault, it was at an end; and the old man, incumbered with an overcoat, inert, speechless and helpless, lay at the feet of this witness, and it was while the plaintiff was in this condition, on Atkinson's own shewing, that he assaulted him and brought on the struggle which, it is claimed, culminated in the injuries the subject of this action.

I find it difficult to believe that Mrs. Atkinson, on a chilly evening in October, stood idly at her doorway for 15 minutes, or

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thereabouts, watching the plaintiff making his way to his sister's house, and still for another 10 minutes or so watching in the same direction, without inferring that on the occasion in question a good deal happened, and much that gave the Atkinsons ground for anxiety or alarm, that is not disclosed in the evidence of either Mrs. Atkinson or her husband; and upon the evidence, verbal and circumstantial, touching the affray, the inference I feel I ought to draw is not that it occurred in the way these witnesses described it, but, on the contrary, that Atkinson began the affray; and, if I accept his own evidence, he again assaulted the plaintiff after the first encounter was definitely at an end, as he himself says. If, as is argued, the receipt produced was given a year before—and I find it impossible to believe that these three parties committed the triple mistake of day, and month, and year—it is an important circumstance in weighing the evidence, as Mr. Phelan contended; but I have not found it necessary to sift the evidence upon this point, as, whether it was given on the 15th October or not, I had come to the conclusion above stated before my attention was directed, upon the argument, to the threefold discrepancy in the dating.

I have not overlooked the generally plausible and sometimes cogent argument as to independent witnesses. It was not urged, I think, in this case, and perhaps for the obvious reason that no man against whom an action can be brought or proceedings taken for an assault—nor his wife for that matter—can be regarded as an independent witness until time has barred the remedy; and even then a statement or an argument often repeated in time becomes very convincing to the person making it.

I am of opinion that the infirmity, disability, bodily injury, or change in physical condition of the plaintiff, to adopt the language of the Insurance Act, R.S.O. 1914, ch. 183, had its inception or beginning on the 15th October, 1915; and I find that this was occasioned by "external force," within the meaning of sec. 172 (1) of the Insurance Act, at the hands of the witness Atkinson, in an encounter in which he was the aggressor and in the manner already referred to, and that this happened and was brought about without the intent of the plaintiff, and not as the result, direct or indirect, of anything done by the plaintiff, and without voluntary or negligent exposure to unnecessary danger on his part, within the



meaning of that section; nor is it attributable to the insured's state of health or condition of mind at the time he effected the insurance, within the meaning of the policy.

There remains the question of alleged change of occupation. I am satisfied, upon the evidence, that the plaintiff was a land agent, and this only, when the policy was obtained. When the last renewal receipt was issued and thereafter he was occasionally engaged in handling cattle. This was because land agency business was almost at a standstill. He had not abandoned the calling of a land agent, and he perhaps put through an occasional transaction, but he was occupied for the time being in what was once one of his regular callings. He was not injured while so engaged. His injuries had no relation to what he had in the meantime been engaged in.

The application for insurance contained these provisions:—

"4. My occupation is fully described as follows: real estate agent, not dealing in timber-lands."

"11. The class of risk under my occupation is agreed to be preferred according to the company's classification of risks, and I agree that for any injury received in any occupation or exposure classed by this company as more hazardous than that above stated, I shall be entitled to recover only such amount as the premium paid by me would purchase at the rate fixed for such increased hazard."

#### "Declaration.

"I, the undersigned, being desirous of effecting an insurance with the Railway Passengers Assurance Company, do hereby declare that the above statement of my age and other particulars is true and complete, and that I have not concealed anything material to be known to the company; and I do hereby agree that this declaration shall be the basis of the contract between me and the Railway Passengers Assurance Company, and that I am willing to accept a policy subject to the conditions prescribed by the company and expressed in the policy.

"Dated Toronto this 17th day of June, 1914.

"Signature of Applicant A. C. Morran.

"Agency H.O. (L. H. Morran.)"

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The question of materiality in this contract of insurance is a question of fact for me, or eventually a higher Court, to determine: sec. 156 (6). Having regard to the event, and to the terms and provisions of clause 11 of the application, limiting the liability of the company, as above set out, "for any injury received in any occupation or exposure classed by this company as more hazardous than that above stated," and assuming (without deciding) that the company can still rely upon the application, notwithstanding the provisions of sec. 156, sub-secs. (1) and (3), and the latter part of sec. 172 (1), I am of opinion that the intermediate change of occupation, or the failure to declare it at the date of the renewal, was not a circumstance material to the company or affecting the extent of the risk they undertook. The company expressly provided for what they thought material, namely, by limiting their liability in the event of injury received while the assured was engaged in a more hazardous occupation. I am of opinion, too, that the attempt of the company to qualify their liability or vary the terms of the policy by the receipt of the 10th June, 1915, is ineffective. Section 156 (1) provides that the terms and conditions shall be all set out on the policy, and, if not so set out, shall not be admissible in evidence, etc. The renewal receipt cannot be invoked to vary the policy or defeat the specific provisions of sec. 156.

In the opinion I entertain as to the proper disposal of this action, it is unnecessary to consider the figures submitted by Mr. McCarthy and which Mr. Phelan proposed to submit, alternatively based upon change of occupation and increased hazard. They will be filed with the suit papers. The disability of the plaintiff is total. It is not disputed that it is. Dr. Pepler stated that he regards it as permanent. There will be judgment for the plaintiff at the rate of \$10 a week from the date of the accident, less 26 weeks already paid for, with interest from the dates at which the payments fell due according to the terms of the policy, and a declaration as to the plaintiff's future rights under the policy. Costs of the action to the plaintiff.

The construction of the clause headed "Accumulative Bonus" (m) was not discussed. I have not formed any final opinion as to its meaning. Subject to what may be said as to this, I should think that the second year of the policy being current at the time of the accident the 10 per cent. addition would increase the

weekly payment from \$10 to \$11. Counsel can speak or communicate with me as to this, if they desire to, before I endorse the record.

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The defendants appealed from the judgment of LENNOX, J.

June 13. The appeal was heard by MULOCK, C.J. Ex., CLUTE, SUTHERLAND, and KELLY, JJ.

*Wallace Nesbitt*, K.C., for the appellants, questioned the learned trial Judge's finding that the change in the plaintiff's physical condition complained of was due solely to the occurrence of the 15th October, 1915. It was due rather to a latent weakness of the plaintiff's heart. *Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A.C. 592, 36 D.L.R. 477, was distinguishable: the word "exclusively" was in the document in the *Mitchell* case, but not here. Counsel also took the ground that the plaintiff was not entitled to recover the full amount of the policy on the basis of total disability; and, if at all, only on the basis of extra-hazardous or hazardous risk, as referred to in part 8 of the policy, because, subsequent to the issue of the policy, he had changed his occupation to one of the latter class. The occurrence of the 15th October, 1915, was not an accident, but was the result of voluntary or negligent exposure, within the meaning of sec. 172 of the Ontario Insurance Act, R.S.O. 1914, ch. 183. It should have been found that, at the time the policy was renewed, the plaintiff misrepresented a material fact as to his occupation: *Life Association of Scotland v. Foster* (1873), 11 R. (Ct. of Sess. Cas., 3rd ser.) 351; *Thomson v. Weems* (1884), 9 App. Cas. 671; *Yorkshire Insurance Co. Limited v. Campbell*, [1917] A.C. 218; *Sparenborg v. Edinburgh Life Assurance Co.*, [1912] 1 K.B. 195. By the renewal receipt, the assured warranted all the statements in the original application to be true.

*T. N. Phelan*, for the plaintiff, respondent, contended that the learned trial Judge's findings on questions of fact were amply supported by the evidence. On the question of the plaintiff's physical condition at the time of the accident, the learned trial Judge had found that, if any latent impairment of the heart existed, the plaintiff was unaware of it. As to the accident being the sole cause of the plaintiff's permanent disability, the learned



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trial Judge's finding that such disability was the result of the encounter only, and was not attributable to the plaintiff's state of health at the time he effected the insurance, was correct: *Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A.C. 592, 36 D.L.R. 477, a case directly applicable; *Connecticut Mutual Life Insurance Co. of Hartford v. Moore* (1881), 6 App. Cas. 644. The learned trial Judge's finding that the happening of the 15th October, 1915, was an accident so far as the plaintiff was concerned, could not successfully be questioned. As to the change of occupation, any such change which took place was not material, as the learned trial Judge had found. As to the form of the renewal receipt, sec. 156 of the Insurance Act sets out distinctly where the terms of the contract must be stated, and the form of the renewal receipt was an attempt by one party to vary a completed contract without the other party's consent. At any rate, the acceptance of premiums after the renewal, and after learning of the change of occupation, estopped the defendants from setting up this defence: Laverty on the Insurance Law of Canada, p. 73; *Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co.* (1903), 33 Can. S.C.R. 94; *Howard v. Lancashire Insurance Co.* (1885), 11 Can. S.C.R. 92.

*Nesbitt*, in reply.

October 15. SUTHERLAND, J.:—An appeal from the judgment of Lennox, J., dated the 10th January, 1918.

The plaintiff was insured against "loss resulting from bodily injuries effected directly and independently of all other causes through accidental means, and as the direct result of some cause not attributable to the assured's state of health," under policy No. 100852 of the defendant company, dated the 17th June, 1914.

The policy was to run for 12 months from date, and was subject to renewal "by mutual consent from term to term thereafter by the payment of the premium" specified or any amended premium the company might require.

Before its expiration it was renewed, and a receipt for a premium given by the defendant company in part as follows:—

"Policy No. 100852.

"Received this 10th day of June, 1915,  
of Mr.

Andrew C. Morran

the sum of six. . . . .00/100 dollars, being a premium for an assurance upon the life of himself, from the 10th day of June, 1915, to the 10th day of December, 1915, at noon."

"This renewal receipt is issued subject to all agreements, conditions, and provisions of the said policy, as well as those of any endorsement attached to said policy, and the insured, upon the acceptance of this renewal, makes the further statement that the warranties in the original application are true and complete at this date, and that the hazard at this date is no greater than or different from that of the hazard at the date of the policy."

As a result of a fight between the plaintiff and one Atkinson, his tenant of a farm, the plaintiff, on the 15th October, 1915, sustained bodily injuries which, admittedly, wholly and permanently disabled him.

The plaintiff gave notice to the defendants of the accident, and of his total and permanent disability resulting therefrom, which the defendants investigated, and, at first recognising liability, paid to the plaintiff at the end of quarterly periods of 13 weeks each the weekly indemnity which they had agreed under the terms of the policy to pay, as follows: \$130 on or about the 15th January, 1916, and a similar sum on or about the 15th April, 1916. Thereafter the defendants refused to make further payments and repudiated further liability under the policy.

The plaintiff thereupon issued the writ herein on the 3rd November, 1916, claiming \$390, the amount of three quarterly payments of weekly indemnity at the rate of \$10 per week, alleged to be in arrears under the terms of the policy.

In his statement of claim he asked for a declaration of his rights under the policy: (a) with respect to the payment of the weekly indemnity thereafter to accrue; (b) in the event of loss of the plaintiff's life resulting from the accident complained of; and (c) with respect to accumulative bonus accruing to the plaintiff.

In the schedule of warranties made by the assured, dated the 17th June, 1914, which warranties it was agreed therein were the basis of the insurance, appear the following statements:—

"(4) My occupation is fully described as follows: real estate agent, not dealing in timber-lands."

"(11) The class of risk under my occupation is agreed to be preferred according to the company's classification of risks, and

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I agree that for any injury received in any occupation or exposure classed by this company as more hazardous than that above stated, I shall be entitled to recover only such amount as the premium paid by me would purchase at the rate fixed for such increased hazard."

And it also contains the following declaration:—

"I, the undersigned, being desirous of effecting an insurance with the Railway Passengers Assurance Company, do hereby declare that the above statement of my age and other particulars is true and complete, and that I have not concealed anything material to be known to the company; and I do hereby agree that this declaration shall be the basis of the contract between me and the Railway Passengers Assurance Company, and that I am willing to accept a policy subject to the conditions prescribed by the company and expressed in the policy."

The plaintiff had been at one time a drover, but had discontinued that occupation on or before the 17th June, 1914. At the time when the said policy was renewed in 1915, his business as a real estate agent having become less active and remunerative, he had returned to his former occupation of drover, and was engaged therein at the time of the accident in question.

The defendants plead that the plaintiff, in making application for the renewal of the policy, failed to disclose to the defendants material facts referring to the change in occupation of the plaintiff; and also misrepresented the state of his health and physical condition, representing himself to be in good health, when in fact he had a disease of the heart. They further allege that on this account the policy is void. They also plead that if the plaintiff suffers from any permanent disability it is not the result of bodily injuries "effected directly and independently of all other causes through accidental means," but is due to the fact that the plaintiff suffered from a disease of the heart and was not in good physical condition at the time he received his injuries.

The judgment at the trial directed payment by the defendants of \$10 a week from the date of the accident, with interest, less 26 weeks' payment already made, and a declaration as to the plaintiff's future rights under the policy, with costs.

The medical testimony on both sides is in agreement that the plaintiff after the accident was found to be suffering from a disease of the heart, known as auricular fibrillation.



During the fight, the plaintiff was knocked down by Atkinson. While attempting to rise, he caught hold of Atkinson's legs, and the latter held or pressed him back. During the plaintiff's strenuous efforts to get up, his heart was subjected to a great strain. On account of this strain on the auricle, and its inability to respond freely, it went, as it is said, or commenced to go, into a state of fibrillation, which consists in the individual fibres of which it is composed, and which in a normal and healthy condition would contract in unison, beginning to do so independently of each other, in consequence of which the auricle did not fully contract, and the blood was not properly driven by means thereof.

While the medical testimony is in agreement that this serious and disabled condition in the heart exists, the witnesses called by the plaintiff testify that such condition was caused by the strain to which, at the time of the fight, the heart was subjected, and in their opinion could be thus brought about even in the case of a heart normally sound. They admit that very generally a condition of auricular fibrillation occurs in the case of hearts not previously healthy.

Those called by the defendants testified that this condition of auricular fibrillation found to exist in the plaintiff's case was consistent only with the assumption of some previous infection of the heart. They suggested that they found a leakage in the mitral valve from some old infection, the effect of which was to cause the heart to do more work and not be in a condition of compensation. The function of this valve is to prevent the blood going the wrong way, and if a certain amount of the blood escapes and goes the wrong way the heart has to work harder and pump more blood to make compensation. The result of this is that the heart dilates. They suggested that the infected condition of the heart must have been as far back as the date of the policy and receipt already referred to.

Upon this conflicting testimony, the trial Judge came to the definite conclusion that "the disability from which the plaintiff" suffered "began on the 15th October, 1915," and that previously he had enjoyed good health and was, "to all appearance, and as far as he and people associated with him knew, a healthy, sound, and capable man."

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I am quite unable, after a careful perusal of the evidence, to arrive at the conclusion that such finding was erroneous; but, even if the plaintiff's heart had been affected by some trouble prior to the date of the accident, as to which he was ignorant, the case of *Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A.C. 592, 36 D.L.R. 477, would be applicable. The facts in that case are set out in the head-note as follows:—

“The appellants insured the respondent against bodily injury sustained through accidental means and resulting ‘directly, independently and exclusively of all other causes’ in total disablement from performing the duties of his occupation. A statement by the respondent that he was in sound condition mentally and physically was made a warranty by the policy. After the issue of the policy the respondent by accidental means severely sprained his wrist. The appellants for seven quarters paid him the amount provided in the policy for total disablement, but then declined to make further payments. The respondent, being still disabled, sued upon the policy. It appeared that about ten or fifteen years before the date of the policy the respondent had suffered from a tubercular affection of a small part of his left lung, which had caused a lesion which had then healed. There were concurrent findings that at that date there was no active tuberculosis in respondent's arm, but that there was in his system tuberculosis which was latent and would have remained harmless had it not been for the accident, and that apart from tubercular infection the wrist would have recovered within six months of the accident.”

The trial Judge having found (see *Mitchell v. Fidelity and Casualty Co. of New York* (1916), 35 O.L.R. 280, 285), that the “diseased condition” was “not an independent and outside cause, but . . . a consequence and effect of the accident,” it was held “that there was no breach of warranty, that the disablement resulted ‘directly, independently and exclusively of all other causes’ from the accident, and that the respondent was entitled to recover under the policy.”

It was also contended on behalf of the defendants that the injury sustained by the plaintiff was not the result of accident at all, but that the fight was voluntarily entered into by the plaintiff, or voluntarily continued by him after it had temporarily ceased.

The trial Judge has dealt with this also, and apparently given

credit to the testimony of the plaintiff as against that of the defendants. He finds that "Atkinson began the affray," and "again assaulted the plaintiff after the first encounter was definitely at an end." His finding on this point is also fully warranted by the evidence.

But it was urged on behalf of the defendants—and particular stress was laid on this by counsel upon the argument—that there was a warranty as to the occupation of the plaintiff, and, as he had changed from a less to a more hazardous one, this avoided the policy.

By the terms of clause 11 of the warranties already referred to, however, a change of occupation was contemplated by the parties to the contract, and a provision made for the recovery of a different amount by way of compensation, in case of injury received in any occupation or exposure classed by the company as more hazardous. It is clear that in the present case the injuries sustained by the plaintiff did not occur while he was engaged in the occupation of drover.

Under these circumstances, the effect contended for cannot be given to the warranty. As to the question of the materiality of the change in occupation, sec. 156, sub-sec. 6, of the Ontario Insurance Act, R.S.O. 1914, ch. 183, applies. The question of materiality is for the trial Judge, who has found that the "intermediate change of occupation, or the failure to declare it at the date of the renewal, was not a circumstance material to the company or affecting the extent of the risk they undertook." See *Strong v. Crown Fire Insurance Co.* (1913), 29 O.L.R. 33, at p. 55 and following pages.

I think the appeal fails on all grounds, and must be dismissed with costs.

MULOCK, C.J. Ex., agreed with SUTHERLAND, J.

CLUTE, J.:—Appeal from the judgment of Lennox, J., dated the 10th January, 1918. The action was brought on a policy of insurance dated the 17th June, 1914, for one year (premium payable semi-annually) beginning on the 10th June, 1914. "But the policy may be renewed by consent from term to term thereafter upon payment of the premium."

The renewal receipt contains this clause: "This renewal is issued subject to all conditions and provisions of the said policy as

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well as those of any endorsement upon the said policy, and the assured in the acceptance of this renewal makes the further statement that the warranties in the original application are true and complete at this date and that the hazard at this date is no greater or different than that of the hazard at the date of the policy."

The plaintiff was assured "against loss resulting from bodily injuries effected directly and independently of all other causes through accidental means and as the direct result of some cause not attributable to the assured's state of health or condition of mind."

The plaintiff claims that on the 15th October, 1915, he was violently assaulted and beaten by one Atkinson and sustained bodily injuries which wholly and continually disabled him from prosecuting any and every kind of business.

The defendants admit the policy and the renewal, but charge that the plaintiff in his application for the policy and renewal failed to disclose to the defendants material facts, and misrepresented the state of the plaintiff's health and physical condition; that the plaintiff represented himself as in good health, whereas in fact at the time of such application he had a disease of the heart and otherwise was not in good physical condition.

It is further alleged that the defendants have paid to the plaintiff the full amount due him in respect to the bodily injuries alleged, and any alleged permanent disability is not the result of bodily injuries effected directly or independently of all other causes through accidental means, but is due to the fact that the plaintiff suffered from a disease of the heart and was not in good physical condition at the time he received such injuries, and the alleged disability is not within the terms of the policy.

The learned trial Judge has found that prior to the 15th October, 1915, the plaintiff enjoyed good health, and at the time of the insurance and renewals he was—"having regard to his age, of course—to all appearance, and as far as he and the people associated with him knew, a healthy, sound, and capable man," and that "in effecting and continuing the insurance he was not guilty of bad faith, intentional concealment, or conscious misrepresentation as to his condition or state of health." He further finds, "as a conclusion of fact, that the disability from which the plaintiff is

suffering began on the 15th October, 1915; and, whether provoked or unprovoked, the origin and cause of it was the manner in which he was treated and handled by the witness Atkinson on that occasion . . . .” He does not believe that the plaintiff was the aggressor; “but, even if it were true, and I am not of that opinion, that the plaintiff began the assault, it was at an end; and the old man, incumbered with an overcoat, inert, speechless and helpless, lay at the feet of this witness (Atkinson), and it was while the plaintiff was in this condition, on Atkinson’s own shewing, that he assaulted the plaintiff and brought on the struggle which, it is claimed, culminated in the injuries the subject of this action . . . .”

He is further of opinion “that the infirmity, disability, bodily injury, or change in physical condition of the plaintiff, to adopt the language of the Insurance Act, . . . had its inception or beginning on the 15th October, 1915; and I find that this was occasioned by ‘external force,’ within the meaning of sec. 172 of the Insurance Act, at the hands of the witness Atkinson, in an encounter in which he was the aggressor and in the manner already referred to, and that this happened and was brought about without the intent of the plaintiff, and not as the result, direct or indirect, of anything done by the plaintiff, and without voluntary or unnecessary exposure on his part, within the meaning of that section; nor is it attributable to the insured’s state of health or condition of mind at the time he effected the insurance, within the meaning of the policy.”

I am of opinion that the evidence fully warrants the findings of the trial Judge.

In the policy, under the heading “Schedule of Warranties made by the Assured, which warranties it is agreed are the basis of this assurance,” the plaintiff is described as “real estate agent, not dealing in timber-lands.” It is alleged that at the time of the renewal the plaintiff had changed his occupation to that of drover, which change was not communicated to the defendants.

Referring to this the trial Judge says:—

“There remains the question of alleged change of occupation. I am satisfied, upon the evidence, that the plaintiff was a land agent, and this only, when the policy was obtained. When the last renewal receipt was issued and thereafter he was occasionally

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engaged in handling cattle. This was because land agency business was almost at a standstill. He had not abandoned the calling of a land agent, and he perhaps put through an occasional transaction, but he was occupied for the time being in what was once one of his regular callings. He was not injured while so engaged. His injuries had no relation to what he had in the meantime been engaged in."

The application for insurance contains these provisions:—

"(4) My occupation is fully described as follows: real estate agent, not dealing in timber-lands.

"(11) The class of risk under my occupation is agreed to be preferred according to the company's classification of risks, and I agree that for any injury received in any occupation or exposure classed by this company as more hazardous than that above stated, I shall be entitled to recover only such amounts as the premium paid by me would purchase at the rate fixed for such increased hazard."

"Declaration.

"I, the undersigned, being desirous of effecting an insurance with the Railway Passengers Assurance Company, do hereby declare that the above statement of my age and other particulars is true and complete, and that I have not concealed anything material to be known to the company; and I do hereby agree that this declaration shall be the basis of the contract between me and the Railway Passengers Assurance Company, and that I am willing to accept a policy subject to the conditions prescribed by the company and expressed in the policy." (In the margin, "semi-annually, replacing No. 21262, \$200.00, accum." added).

"Dated Toronto this 17th day of June, 1914."

"Signature of Applicant A. C. Morran.

"Agency H. O. (L. H. Morran)."

The learned counsel for the defendants argued that there was a change of occupation at the time of the renewal, and that this change, made without notice to the defendants at the time of the renewal, avoided the policy. But the terms of the policy are subject to the provisions of the Insurance Act, R.S.O. 1914, ch. 183, sec. 154, which section declares that secs. 155 to 158 shall apply to every contract of insurance. Section 156 (1) provides that



"all the terms and conditions of the contract of insurance shall be set out in full on the face or back of the policy or by writing securely attached to it when issued, and unless so set out no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect shall be valid or admissible in evidence to the prejudice of the assured or beneficiary."

It may be pointed out here that, while the defendants seek to import into the policy the clause above quoted in the renewal receipt, that the warranties in the original application are true and complete at the date of the renewal, and that the hazard at this date is no greater than or different from that of the hazard at the date of the policy, there is no such clause on the face or back of the policy or by any writing attached to it when issued, and the attempt to introduce such clause into the renewal receipt is ineffectual under the terms of the statute, for the reason that the renewal did not constitute or create a new policy but is expressly authorised as a term of the policy, and although it required the assent of both parties, when the assent was given, by receipt of the premium the policy was in fact renewed under the terms and conditions under which it was issued.

The statement as to occupation in the application was true, and there was no misrepresentation in respect thereof. Sub-section 2 provides that "whether the contract does or does not provide for its renewal but it is renewed by a renewal receipt it shall be a sufficient compliance with sub-section 1, if the terms and conditions of the contract were set out as provided by that sub-section and the renewal receipt refers to the contract by its number or date." Here the policy number is No. 100852, and this number is given in the renewal receipt.

But there is a further difficulty in the defendants' way. Sub-section 3 provides that "the proposal or application of the assured shall not as against him be deemed a part of or be considered with the contract of insurance except in so far as the Court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract." This clearly refers to a misrepresentation in the original application, not in the application to renew, and in the original application it is not pretended that there was any misrepresentation as to occupation.

Sub-section 5 provides that the contract is not to be invalidated

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by erroneous statements in the application unless material, and this includes a warranty as well as other conditions and stipulations.

Sub-section 6 declares that "the question of materiality in any contract of insurance shall be a question of fact for the jury, or for the Court if there is no jury; and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto shall have any force or validity."

The trial Judge has expressly found that the intermediate change of occupation, or the failure to declare it at the date of renewal, was not a circumstance material to the company or affecting the extent of the risk it undertook.

As pointed out by Lennox, J., "the company expressly provided for what they thought material, namely, by limiting their liability in the event of injury received while the assured was engaged in a more hazardous occupation."

Clause 11 clearly contemplates the possibility of a change of occupation from the preferred class to one more hazardous, and in that case provides for an injury received in any occupation or exposure classed by the company as more hazardous, etc., and limits recovery to only such amount as the premium paid would purchase. This is reasonable and fair, and excludes the contention offered on behalf of the defence that, although the plaintiff had not received any injury in such occupation or exposed class, he nevertheless would only be entitled to such an amount as the premium paid by him would purchase in that occupation or exposed class. It is not pretended here that the injury received by the plaintiff was owing to his having been engaged in the cattle business. So far as his injury was concerned, the alleged change of occupation was not material to the risk run and the injury received, and affords no answer to the plaintiff's claim and no ground for the reduction of that claim by reason of the cattle business being more hazardous than that of real estate agent.

After the defendants received the report of their agent that the plaintiff was a cattle-dealer, they paid two instalments of thirteen weeks each, thereby treating the policy as in force.

As to the alleged warranty of health, the defendants contend

that there was a breach which precludes the plaintiff from recovery. The finding of the learned trial Judge is against this contention. He points out that the professional opinion in this case was "qualified, reserved, and moderate on both sides;" and, while entertaining the sincerest respect for the professional opinions put in evidence by the defence, and in the absence of facts and circumstances that speak for themselves, he might regard it as conclusive or nearly conclusive in some cases, yet the train of practically undisputed facts and circumstances in this case and the sequence of events before and after the 15th October, are so distinctly opposed to the "theoretic possibilities—or abstract probabilities—set up by the defence, that I am definitely of the opinion, as a conclusion of fact, that the disability from which the plaintiff is suffering began on the 15th October, 1915; and, whether provoked or unprovoked, the origin and cause of it was the manner in which he was treated and handled by the witness Atkinson on that occasion."

This, together with the other findings referred to, is, I think, conclusive, supported as it is by the evidence, against the defendants' contention.

But, assuming that the plaintiff was afflicted with some heart trouble prior to the 15th October, of which he had no knowledge, the case of *Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A.C. 592, 36 D.L.R. 477, is conclusive against the defendants. There the appellants insured the respondent against bodily injury sustained through accidental means and resulting "directly, independently and exclusively of all other causes," in total disablement from pursuing the duties of his occupation. The respondent's statement that he was in sound condition mentally and physically was made a warranty by the policy. After the issue of the policy the respondent by accidental means severely sprained his wrist. The appellants for seven quarters paid him the amount provided in the policy for total disablement, but then declined to make further payments. It appeared that about ten or fifteen years before the date of the policy the respondent had suffered from a tubercular affection which had caused a lesion of the lung which had then healed. There was no active tuberculosis in the respondent's arm when he was injured, but there was in his system tuberculosis which was latent and would have remained harmless

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had it not been for the accident, and, apart from tubercular infection, the wrist would have recovered within six months of the accident: *Held*, that there was no breach of the warranty, that the disablement resulted "directly, independently and exclusively of all other causes" from the accident.

But it is urged that the wording of the policy in this case differs from that in the *Mitchell* case. The word "exclusively" used in the *Mitchell* case is not used in the present case, and to that extent, if there is a difference, it is in favour of the present plaintiff. The words "and as the direct result of some cause not attributable to the assured's state of health or condition of mind," under the policy here considered, while not appearing in the *Mitchell* case, do not, in my opinion, help the defendants.

It cannot here be said that the condition of the plaintiff caused by the injuries received from Atkinson was the direct result of some cause attributable to the assured's state of health immediately prior to the assault; for, in the language used by Middleton, J., and approved by the Judicial Committee in the *Mitchell* case, "This diseased condition is not an independent and outside cause, but it is a consequence and effect of the accident," it is not attributable to the assured's state of health as the direct result of the cause.

Reference was made by Mr. Nesbitt to *Yorkshire Insurance Co. Limited v. Campbell*, [1917] A.C. 218. That was the case of a marine insurance policy under the Commonwealth of Australia Marine Insurance Act, 1909, sec. 39, where words qualifying the subject-matter of the insurance *prima facie* were held to be words of warranty constituting a condition which must be complied with, whether material to the risk or not.

There is nothing in the Act under which that case was decided to correspond with sub-sec. 6 of sec. 156 of our Insurance Act. The decision has no application to the present case.

It was further argued that sec. 172 (1), which defines what "accident" includes, excluded the injuries received by the plaintiff from Atkinson as an accident within that definition. I am unable to agree with this view. The statute provides that in every contract of insurance against accident, etc., "the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person

injured, or as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger, and no term, condition, stipulation, warranty or proviso of the contract varying the obligation or liability of the assurer shall as against the assured have any force or validity." In the present case it cannot be denied that the bodily injury suffered by the plaintiff at the hands of Atkinson was occasioned by an external force or agency, nor can it be said that it happened with the direct intent of the person injured.

But it is said that the words "or as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger," exclude the present case from the definition of what is an accident, especially the words "such act not amounting to voluntary or negligent exposure to unnecessary danger." On the contrary, I think these later words enlarge the class of cases brought within the definition. The meaning is that the definition includes bodily injury which happens "without the direct intent of the person injured," and also the class of cases where, although it be the indirect result of his intentional act, that does not exclude it from the class where such act is not voluntary or negligent.

The plaintiff and the witness Atkinson give different accounts of what took place. The trial Judge accepted the statement of the plaintiff and discredited that of the witness Atkinson. He finds that Atkinson was the aggressor in the first place, and that when the plaintiff was lying helpless at the feet of Atkinson the assault was renewed and that it was during this last assault that the injuries complained of were suffered.

The findings of the trial Judge are fully supported by the evidence; and, in my opinion, the defendants fail upon all grounds, and the judgment of the trial Judge is right and ought to be affirmed, and this appeal dismissed with costs.

KELLY, J.:—This action is upon a policy of insurance issued by the defendants to the plaintiff on the 17th June, 1914, insuring the plaintiff for the term of one year from the 10th June, 1914, against loss resulting from bodily injuries effected directly and independently of all other causes through accidental means, and as a direct result of some cause not attributable to the assured's state of health or condition of mind, etc.

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An earlier policy issued by the defendants to the plaintiff on the 10th June, 1913, had lapsed before the date of the policy now sued upon. The policy of the 17th June states that its term is twelve months, beginning at 12 o'clock noon on the 10th day of June, 1914, and ending at the same hour on the 10th day of June, 1915, and that it "may be renewed by mutual consent from term to term thereafter by the payment of the premium above specified, or such amended premium as the company may require."

On the 10th June, 1915, a renewal receipt was issued for payment of \$6 premium from the 10th June, 1915, to the 10th December, 1915.

A further term of the policy is that if the injuries insured against shall wholly and continually disable and prevent the assured from transacting any and every kind of business, the company will pay him, so long as such total disability shall last, the weekly indemnity of \$10.

The plaintiff alleges that on the 15th October, 1915 (within the six months), he was assaulted and beaten by one Atkinson, and thereby sustained bodily injuries which wholly and continually disabled him from transacting any and every kind of business.

After the trial, on the 10th January, 1918, judgment was given in the plaintiff's favour for: (1) \$938.34 as and for arrears of weekly indemnity and interest thereon up to the 7th January, 1918; (2) declaring that beginning on the 14th January, 1918, the plaintiff is entitled under the policy to a weekly indemnity of \$10 during his natural life; (3) declaring that in the event of his death before the 15th August, 1918, as a result of the accident referred to, independently and exclusively of other causes, the defendants are liable to pay to the beneficiary named in the policy \$2,000, together with 2 years' accumulation of 10 per cent. *per annum* of the principal sum, making in all \$2,400, upon being furnished with such evidence as the defendants are entitled to require under the policy.

The particular grounds of the defendants' appeal are:—

"(a) That the plaintiff's present physical condition did not arise as a result solely of the alleged accident to him on the 15th October, 1915.

"(b) That the plaintiff is not entitled to recover the full amount of the policy on the basis of his total disability; the defendants submitting that, on the evidence and the terms of the policy, the



plaintiff, if entitled to recover at all, can recover only on the basis of extra-hazardous or hazardous risk.

“(c) That the occurrence of the 15th October, 1915, was not an accident, but a risk voluntarily incurred by the plaintiff; that the ‘fight’ on that day was commenced by the plaintiff; and that the defendants are not liable.

“(d) That it should have been found that at the time the policy was renewed in June, 1915, the plaintiff was not a dealer in real estate, but was in fact a drover of cattle, and that in so renewing the said policy the plaintiff misrepresented a material fact to the defendants, whereby the said policy was void, and that the defendants are not liable to the plaintiff thereunder.”

Material parts of the contract relating to the questions so set up, are these:—

Part 4: “The provisions hereinafter contained and any endorsements hereon and the assured’s proposal are a part of this contract, which is made subject thereto and to the payment of the premium of \$12.”

Part 8: “If the assured is injured while performing the work or duties of any other occupation, whether as an isolated act or otherwise, or in any exposure, whether as an isolated act or otherwise (except ordinary duties about his residence), classed by this company as more hazardous than that mentioned in the copy of the assured’s warranties, the insurance shall be only for such sum as the premium paid by the assured would purchase at the rate charged by the company for such increased hazard.”

In the schedule of warranties made by the assured when the insurance was effected in June, 1914, his occupation is given as “real estate agent, not dealing in timber-lands;” and, after having answered in the negative questions as to the existence of specific ailments or physical defects, he stated that he had no other physical defect, infirmity, or ill-health of any description; and he then declared in writing that the statement of his age and other particulars made in the warranties was true and complete.

The physical condition of an assured at the time of the insurance contract becomes in the present instance material, both as to the assured’s actual condition at that time, and the knowledge he had of any lurking or latent weakness or physical impairment, if such in fact existed. On the question of such knowledge by the assured,

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much must depend on his own evidence. The learned trial Judge, whose careful and exhaustive *resumé* of the case covered every aspect of it, was so impressed with the reliability of the assured and his daughter, and the truth of their statements, that he accepted their testimony, on that point at least, without qualification, and found that "in effecting and continuing the insurance he was not guilty of bad faith, intentional concealment, or conscious misrepresentation as to his condition or state of health."

Because of the discovery after the accident that prior to that time there was a latent weakness or impairment of the plaintiff's heart, that finding assumes added importance. It was established to the satisfaction of the trial Judge, on evidence which he deemed sufficient, that, whatever weakness there may have been in the plaintiff's physical condition, down to the 15th October, 1915, it was unknown to him; that prior to that date he enjoyed good health to a degree permitted to few to enjoy; and that, judging from incidents recorded in the evidence, he was, when he effected the insurance, and at its renewal—having regard to his age—to all appearance, and so far as he and persons associated with him knew, a healthy, sound, and capable man. Entertaining an honest belief in that condition of things, he made the application for insurance which culminated in the issuing of the policy now sued upon.

By sub-sec. 1 of sec. 156 of the Ontario Insurance Act, R.S.O. 1914, ch. 183, it is provided that "subject to the provisions of section 193" (not of importance here) "all the terms and conditions of the contract of insurance shall be set out in full on the face or back of the policy or by writing securely attached to it when issued, and unless so set out no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect shall be valid or admissible in evidence to the prejudice of the assured or beneficiary."

By sub-sec. 2: "Whether the contract does or does not provide for its renewal but it is renewed by a renewal receipt it shall be a sufficient compliance with sub-section 1, if the terms and conditions of the contract are set out as provided by that sub-section and the renewal receipt refers to the contract by its number or date."

By sub-sec. 3: "The proposal or application of the assured shall not as against him be deemed a part of or be considered with the contract of insurance except in so far as the Court may deter-

mine that it contains a material misrepresentation by which the insurer was induced to enter into the contract."

By sub-sec. 6: "The question of materiality in any contract of insurance shall be a question of fact for the jury, or for the Court if there is no jury; and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto shall have any force or validity."

In so far as the appellants' objection that the plaintiff's present physical condition is not the result solely of the happening of the 15th October, 1915, rests for its validity upon the presence of a latent weakness or defect in the condition of the plaintiff's heart, it is, in my judgment, satisfactorily answered by the decision of the Privy Council in the recent case of *Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A.C. 592, 36 D.L.R. 477. The Privy Council there upheld the judgment of the trial Judge (Middleton, J.), which had been affirmed by the Appellate Division (see *Mitchell v. Fidelity and Casualty Co. of New York* (1916), 35 O.L.R. 280, 37 O.L.R. 335, 26 D.L.R. 784). The contract of insurance in that case insured the assured against "bodily injury sustained . . . through accidental means . . . and resulting, directly, independently, and exclusively of all other causes in an immediate, continuous, and total disability . . ." At the trial of that action, the issue was raised as to whether the injury the assured sustained resulted, independently and exclusively of all other causes, in immediate and total disability, thus raising the question as to the effect of the assured's physical condition at and prior to the accident. The trial Judge found, on the medical testimony, that it was clear that prior to the accident there had been a tubercular lesion in the lung, which had apparently completely healed, and that, no doubt, the assured was entirely unaware of his lung having been diseased in that way: he found too, on a consideration of whether the total disability resulted independently and exclusively of all other causes, and notwithstanding the prior tubercular condition, that the diseased condition (of the arm) which resulted in total disability was the direct result of the bodily injury which the assured sustained when he met with the accident (falling from the berth of a sleeping car), his opinion being

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that the tuberculosis in the system was harmless until, as the direct result of the accident, it was given an opportunity to become active. The parallel between that case and the case at bar is sufficiently complete to make that decision particularly applicable here.

Conceding that there existed a latent weakness in the plaintiff's heart prior to the accident, it was, notwithstanding that condition, the opinion of some at least of the medical witnesses that the disability from which the plaintiff now suffers was the direct result of the happening on the 15th October, 1915.

Dr. Parker, who was in attendance upon him from soon after the accident, says (p. 56 of the notes of evidence): "Now, in speaking of heart cases, one has to have the case under observation for a considerable length of time in order to make a complete diagnosis. You would have to take the past history into consideration, any previous illnesses; and my ultimate diagnosis of this case was that the man had developed, at the time of the accident had developed, a new condition that had not existed before the accident"—which the witness then described as auricular fibrillation, which (he says at p. 60) "is very apt to be permanent, it is almost certain to be permanent." This was emphasised by his answers to these questions:—

(Page 61): "Now, Doctor, what connection is there between the injury according to the history you received of it and the condition of auricular fibrillation? A. Well, my conception of the case is that the injury was responsible for the auricular fibrillation.

"Q. Is that your opinion? A. That is my opinion.

"His Lordship: Like all other causes it is consistent with what he told you? A. Not altogether that, because it is consistent with what I observed too, that is the objectives."

(Page 64): "Q. I am asking you whether or not the present disability is the result of the auricular fibrillation? A. Yes, undoubtedly, absolutely."

Dr. Loudon, called by the defence, agrees with Dr. Parker, in these answers in his cross-examination:—

(Page 209): "Q. Dr. Loudon, you have heard the opinions expressed by Dr. Parker as to the cause of the present condition? A. Yes, sir.

"Q. Do you agree with the opinion expressed by Dr. Parker here to-day, and if so in what respect? A. Well, I am not sure that I can recall them. I think Dr. Parker admitted that there might be disease in the heart before the accident took place.

"Q. But, as I understand the doctor's opinion, it was that the injury caused the auricular fibrillation, and that that in turn resulted in the present disability—now do you disagree with that opinion of Dr. Parker's? A. No, I do not disagree that auricular fibrillation likely came on with this accident, or after this accident.

"Q. And as a result of this accident? A. Yes.

"Q. And as a result of this accident, and the present disability is in turn the result of that auricular fibrillation? A. Yes."

This witness also says that the assault could have caused the condition of auricular fibrillation, but not of the valve affection; that he has no proof that there was a leakage of the mitral valve before the accident. His view is that there might have been some condition of that kind, whether the plaintiff was cognizant of it or not; that the plaintiff might have had a leaky valve without being conscious of it; and, if he had, it might not have interfered with his ordinary, or even his unusual, exertions.

Dr. Pepler, the regular medical officer of the defendant company, examined the plaintiff shortly after the accident. He stated as his opinion that the plaintiff was probably some years with the condition of the mitral valve which he found; and (on cross-examination) that this might have existed for years without the plaintiff being conscious of it, causing him no inconvenience and no inability to perform his ordinary work and undergo ordinary strain and effort; and that auricular fibrillation might be caused by an excessive strain, whether the heart was healthy or unhealthy; and at p. 221:—

"Q. You state that you are of opinion that Mr. Morran had a broken valve in his heart for probably many years, never giving him any trouble, but on the strain and excitement of the fight the heart dilated and for a time failed to do its work well—was that your conclusion? A. That was my conclusion, yes.

"Q. So that all this acute condition that you describe would not be attributable to the affection of the mitral valve? A. No.

"Q. There must be something added to that? A. Yes.

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"Q. And, in your view of the case, he might have gone on for years not conscious of any difficulty by reason of the condition of the mitral valve? A. Yes."

This is a positive assertion of a cause of injury independent of other causes, and there can be little, if any, doubt that the plaintiff's present total disability is the direct result of the auricular fibrillation which came on with or as a consequence of the injury he received in the accident; and the fact that prior to the accident there was this latent defect of the mitral valve, which first came to light after the accident, and of which he was altogether ignorant up to that time, and which on the medical testimony might have been present for years without interfering with his ordinary or even unusual exertions, is not so associated or connected with the condition which immediately followed upon the injury or the accident as to make it the cause of the present disability.

Whatever was his physical weakness when the insurance was effected, his absolute ignorance thereof was a factor in determining the answers to the questions then put to him and his statement in the schedule of warranties that he had no physical defect, infirmity, or ill-health of any description so far as he knew. He believed that he was absolutely and unqualifiedly a sound, healthy man, so much so indeed that he seems to have had an honest pride that he was able, without inconvenience, to submit himself to tests of energy, exertion, and endurance which few men of his age can be put to. To him there was nothing indicating defect, infirmity, or ill-health, and he had no reason to believe that any such existed.

If, as some of the medical witnesses believe, there then existed this unknown affection of the mitral valve, it was not, under the circumstances, what is ordinarily looked upon as a defect, infirmity, or ill-health, and the statement made, as he made it, should not be held to have been within the meaning of or a breach of the warranty: *Fidelity and Casualty Co. of New York v. Mitchell*, *supra*.

But the appellants say that, if the plaintiff is entitled to succeed, recovery must be limited to the amount recoverable by one in the extra-hazardous or hazardous class, on the ground that subsequent to the issue of the policy he had changed his occupation to one in the latter class. When the policy was issued he was an estate agent. During the ensuing year he engaged also in the business of a drover, though not relinquishing his former occupation of dealing in real



estate as a broker. Apart from whatever effect must otherwise be given to the form of the renewal receipt—and to this I shall refer later—the trial Judge has expressly found that the intermediate change of occupation, or the failure to declare it at the date of the renewal, was not a circumstance material to the appellants or affecting the extent of the risk they undertook. Under sub-sec. 5. (as amended by 5 Geo. V. ch. 20, sec. 19) and sub-sec. 6 of sec. 156 of the Ontario Insurance Act, it was for the Court to pronounce upon the materiality of that part of the contract, and we have its finding on that question.

Perusing the transcript of the evidence, and without the special knowledge possessed by the trial Judge from having seen the witnesses and heard their *vivâ voce* evidence, I would be very reluctant to disturb that finding. On a mere perusal of the evidence, the conclusion can readily be reached that the change of occupation—in so far as there was a change—was not material to the contract. He still continued to be a real estate broker; and, if further emphasis is to be given to the relation of his occupation to the character of his injury, what led up to it, and the manner in which he received it, the consequences to him in no way arose out of or are attributable to his being either a real estate broker or a drover. When the accident happened, he was actually pursuing neither of these occupations; the occurrence had no relation to either of them; and his injury was not received in any occupation or exposure classed by the appellants as more hazardous than that stated in the warranties.

The objection that the injury to the plaintiff did not happen without his direct intent, or that his part in the fight amounted to voluntary or negligent exposure, within the meaning of sec. 172 of the Ontario Insurance Act, is fully answered by the finding of the trial Judge (supported by sufficient evidence) that the infirmity, disability, bodily injury, and change of physical condition of the plaintiff, was occasioned by “external force” within the meaning of that section, at the hands of Atkinson, in an encounter in which he was the aggressor, and that this happened and was brought about without the intent or as the result, direct or indirect, of anything done by the plaintiff, and without voluntary or unnecessary exposure on his part.

The form of the renewal receipt is invoked in support of the appeal. It contains this statement, intended by the appellants to

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bind the assured: "This renewal receipt is issued subject to all agreements, conditions, and provisions of the said policy, as well of those of any endorsement attached to said policy, and the assured, upon the acceptance of this renewal, makes the further statement that the warranties in the original application are true and complete at this date, and that the hazard at this date is no greater than or different from that of the hazard at the date of the policy." The language of sub-sec. 1 of sec. 156 of the Ontario Insurance Act is exacting as to the manner by which and the place where the terms and conditions of the contract are to be stated. As has already been said, the policy contains a provision that it may be renewed by mutual consent from term to term (after the first term stated in the policy) by the payment of the premium (specified in the policy) or such amended premium as the company may require. Payment by mutual consent of the renewal premium is the essential requirement for the renewal of the policy and continuing the contract in force. When the renewal premium was paid and accepted, and without the aid of the issue and delivery of the renewal receipt, the renewal of the contract was complete; and the introduction into the renewal receipt of the additional terms set out in it, and as to the consent to which by the assured there is no evidence, was an attempt by one party to vary, without the agreement or consent of the other, an already completed contract. The so-called change in the assured's occupation seems not to have been looked upon by the appellants as of material importance when the accident happened, or until a considerably later date; for, with knowledge of the extent to which the assured had changed his occupation, the appellants paid the indemnity in the terms of the policy for two terms of 13 weeks each, and only after that was the objection raised on which they now rely.

The trial Judge in his reasons for judgment, on questions most material to the issues involved, made several positive findings of fact which, to me, seem sufficiently warranted by the evidence; and, having regard to the statutory provisions covering the making of insurance contracts, the terms of the contract sued upon, and the authorities applicable to these facts, I am of opinion that the plaintiff's position is entirely established, and that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

[IN CHAMBERS.]

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REX v. CONDOLA.

*Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41 (1)—“Occupant”—Husband and Wife—“Private Dwelling-house”—Sec. 54—Previous Conviction of Wife.*

The “occupant” is the one who has actual use or possession of a thing; and in this case it was held, that the defendant, who was the owner of a dwelling-house, in which he lived with his wife, was the occupant; and the house did not, by virtue of sec. 54 of the Ontario Temperance Act, cease to be his “private dwelling-house,” within the meaning of sec. 41 (1), because his wife, not being the “occupant,” had been convicted of an offence against the Ontario Temperance Act.

Intoxicating liquor having been found in this house, the defendant was convicted by a magistrate of an offence against sec. 41 (1); but the conviction was quashed, because that enactment permits him to have or keep liquor in the private dwelling-house in which he resides.

*Rez v. Irish* (1909), 18 O.L.R. 351, *Kavanagh v. Barber* (1891), 12 N.Y. Supp. 603, and *Hamilton v. City of Fond du Lac* (1870), 25 Wis. 496, followed.

MOTION to quash the conviction of John Condola, made by the Police Magistrate in and for the District of Sudbury, for unlawfully having, on the 1st July, 1918, intoxicating liquor in a place other than in his private dwelling-house, without the license therefor by law required, in contravention of sec. 4 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50, which provides as follows:—

41.—(1) Except as provided by this Act, no person, by himself, his clerk, servant or agent, shall have or keep or give liquor in any place wheresoever, other than the private dwelling-house in which he resides, without having first obtained a license under this Act authorising him so to do, and then only as authorised by such license.

The following facts were agreed upon before the Police Magistrate:—

(1) The liquor produced and analysed was found in the house of the accused.

(2) The liquor was apparently made upon the premises, the product of raisins, grain, etc.

(3) During the year 1917, the wife of the accused, then living with the accused upon the same premises, was convicted of an infraction of the Ontario Temperance Act.

(4) The accused (husband of the woman convicted as aforesaid) was the owner of the said premises.



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The Police Magistrate's reasons for convicting were given in writing, as follows:—

The facts being agreed upon, all I am called upon to determine is the construction of sec. 54 of the Ontario Temperance Act, which reads as follows:—

“If the occupant of any private dwelling-house or of any part thereof is convicted of any offence against any of the provisions of this Act committed in or in respect of such house the same shall be taken to have ceased to be a private dwelling-house within the meaning of this Act during the time the person so convicted occupies the said house or any part thereof.”

The wife of the present occupant was convicted under the Ontario Temperance Act, and therefore the house ceased to be a place where liquor could legally be kept.

The License Inspector visits the house in question and finds a quantity of liquor on the said premises, manufactured thereon, the analyses of which shew the said liquor to contain 57,  $\frac{5}{10}$  per cent. of proof spirits, said to be manufactured from the product of raisins, grain, etc.

It is reasonable to assume that the husband, the present defendant, had knowledge of the previous conviction of his wife; both were then living in the said premises, and still are in occupation; and, by virtue of sec. 54, no liquor may be lawfully kept therein. Should I hold otherwise, the spirit of the law would be thwarted at all times, and divers persons could assume from time to time that any liquor found upon the premises was their property and not the property of the occupant. My interpretation, therefore, is that the present premises shall be held to be a place other than a private dwelling-house, and that, should liquor be found therein during the occupancy by either of the defendants of, the said house or any part thereof, an infraction of the Ontario Temperance Act is committed.

The only relief that could be granted the present defendant or his wife, as against the provisions of sec. 54 of the Ontario Temperance Act, would be their removal from the said dwelling-house and every part thereof.

I therefore adjudge the said John Condola guilty of the offence as charged, and order that he shall forfeit and pay the sum of \$200 and costs, to be paid and applied according to law, and in default of

said payment and costs to be imprisoned in the common gaol at Sudbury for the space of three months.

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September 26. The motion was heard by FALCONBRIDGE, C.J.K.B., in Chambers.

*T. M. Mulligan*, for the defendant.

*Edward Bayly*, K.C., for the Attorney-General.

October 15. FALCONBRIDGE, C.J.K.B.:—The facts were agreed upon as per a memorandum returned by the Police Magistrate. His judgment is also annexed to the papers.

He has given the case his usual careful attention, but I am unable to agree with his view that the defendant's wife is to be held to be *the* occupant of the house.

It was held in *Rex v. Irish* (1909), 18 O.L.R. 351, that a person to be liable under sec. 50 of the Liquor License Act, R.S.O. 1897, ch. 245, must be the occupant thereof within the meaning of the section, i.e., a person enjoying such possession or control over the premises as entitles him to regulate the use which is being made of them, and that a mere boarder was not such a person.

The occupant is the one who has actual use or possession of a thing—the husband is the owner and has actual use and possession.

It was held in *Kavanagh v. Barber* (1891), 12 N.Y. Supp. 603, that a husband, though the head of the family, is not in any legal sense the possessor or occupant of the house or land owned by his wife and in or upon which the family reside.

To the same effect is *Hamilton v. City of Fond du Lac* (1870), 25 Wis. 496.

*A fortiori* neither is a wife the occupant of the husband's property.

The conviction must be quashed without costs.

The usual order of protection to the magistrate will of course be granted.

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## RE HUGHES.

*Trusts and Trustees—Compensation of Trustees—Trustee Act, sec. 67—Reference, Scope of—Scale of Allowance Fixed by Surrogate Court in Respect of other Parts of Estate—Diligence and Capacity of Trustees—Reasonable Allowance—Minimising of Responsibility—Percentage on Taking over and Distributing Estate—Value of Work Done—Value of Estate—Arbitrary Sum Allowed where Estate Large and Duties of Trustees Simple.*

A reference was directed to the Master to fix the compensation to be allowed to trustees under a marriage settlement for their care, pains, trouble, and time expended in and about realising, managing, administering, disposing of, and settling the affairs of the trust, in so far as the same related to the portion of the trust represented in a certain mortgage for \$260,000, made to the trustees to secure a part of the purchase-money of land included in the trust which was sold by the trustees, including the transfer of the mortgage to the Accountant of the Court, for which the trustees had not been compensated: see *Re Hughes* (1918), 42 O.L.R. 345. Compensation for the services of the trustees had previously been fixed by the Judges of a Surrogate Court in respect of the whole of the estate with the exception of this mortgage:—

*Held*, that the Master rightly treated the order of reference as requiring him to ascertain what compensation ought to be allowed to the trustees for their services in connection with this portion of the estate from the time of their appointment down to and including the transfer of the mortgage to the Accountant.

- (2) That the Master was not bound by what had been decided by the Surrogate Judges as to the scale upon which compensation should be fixed.
- (3) That, upon the evidence, the trustees acted as careful, diligent, and competent trustees would be expected to act; the imputation of want of capacity on their part was without foundation; and the compensation ought to be upon the footing of what an ordinarily careful and competent trustee is entitled to receive.
- (4) That the trustees from time to time consulted their *cestuis que trust* as to questions presenting themselves for determination, and made applications for the advice of the Court, thus abstaining from taking unnecessary risks, did not afford ground for cutting down the amount of compensation.
- (5) *Semble*, that what the trustees had done was sufficient to justify the allowance of a percentage on taking over and distributing the estate—the word “distribute” as used in *Re Farmers’ Loan and Savings Co.* (1904), 3 O.W.R. 837, and *Re McIntyre, McIntyre v. London and Western Trusts Co.* (1904), 7 O.L.R. 548, is intended to convey the same idea as the expressions used in *Re Berkeley’s Trusts* (1879), 8 P.R. 193.
- (6) The calculation of percentages upon the various parts of the estate and upon the receipts and disbursement of income is one of the means adopted of fixing a trustee’s compensation; but neither the trustee nor the *cestui que trust* has the right to insist upon its adoption; the tribunal before which the matter comes has to ascertain as best it may what is a fair and reasonable allowance for the trustee’s care, pains, and trouble, and his time expended in and about the estate (sec. 67 of the Trustee Act, R.S.O. 1914, ch. 121); the tribunal cannot be expected to ascertain, weigh, and set a value upon the actual work properly done, and allow such value and no more; regard must be had to the size of the estate.

*Re Fleming* (1886), 11 P.R. 272, 278, 426, and *Re Toronto General Trusts Corporation and Central Ontario R.W.Co.* (1905), 6 O.W.R. 350, followed.

- (7) An allowance of 3 per cent. upon the \$260,000 and 5 per cent. upon the income derived during the period dealt with upon the reference would be unreasonable in the circumstances; the fixing of any sum is more or less arbitrary; and in this case the sum of \$4,000 should be fixed, in addition



to what was allowed in the Surrogate Court, as a sufficient recognition of the faithful administration of a trust of considerable magnitude, but of comparative simplicity, and no more than reasonable *cestuis que trust* ought to be content to pay.  
Master's report varied.

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AN appeal by the Toronto General Trusts Corporation, trustees under the marriage settlement of Patrick Hughes, from the report of the Master in Ordinary upon the reference directed by MIDDLETON, J. (*Re Hughes* (1918), 42 O.L.R. 345), to fix the compensation to be allowed to the corporation "for its care, pains, trouble, and time expended in and about realising, managing, administering, disposing of, and settling the affairs of the trust in so far as the same relates to the portion of the trust represented in" the mortgage dealt with in the order, "including the transfer of the said mortgage to the Accountant of this Court, for which the said trustee has not been compensated." The report fixed the compensation at \$1,000.

September 19. The appeal was heard by ROSE, J., in the Weekly Court, Toronto.

W. N. Tilley, K.C., for the appellants.

F. W. Harcourt, K.C., for the infant *cestuis que trust*.

M. H. Ludwig, K.C., for the adult *cestuis que trust*.

October 15. ROSE, J.:—The first ground of appeal is that the Master in Ordinary exceeded his powers in that he inquired into matters antecedent to the transfer of the mortgage to the Accountant; that all that was referred to him was the question of the compensation for the transfer; and that the compensation for taking over, managing, and selling that portion of the estate which is now represented by the mortgage for \$260,000 ought to be ascertained by the Judge of the Surrogate Court, who left it undetermined at the time of the passing of the accounts referred to in the judgment of Middleton, J. (42 O.L.R. 345).

I do not think that effect could be given to this ground of appeal without doing violence to the language of the order of reference. It seems to me that the learned Master rightly treated the order as requiring him to ascertain what compensation ought to be allowed to the trustees for their services in connection with

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this portion of the estate from the time of their appointment down to and including the transfer of the mortgage to the Accountant.

The second ground is that the Judges of the Surrogate Court have already decided that the remuneration ought to be upon a certain scale, applied by them in passing the accounts of the trustees' dealings with the other portions of the estate; and that, if the matter is not *res judicata*, there is at least the opinion of a competent Court which ought to be followed.

This ground seems to me to fail upon the facts. It is true that the Judges in the Surrogate Court left open the question of the compensation to be awarded in respect of the matters now being dealt with, and I think it sufficiently appears that, as advised when the matter was before them, they would have allowed something; but I think each of them would repudiate the suggestion that, either in written reasons or in formal order, he had finally determined anything with reference to the amount that ought to be awarded.

The third ground is that the compensation awarded is inadequate.

In fixing the amount of the compensation, the Master in Ordinary took into consideration, as he was bound to do, the size of the estate, the nature of the duties which the trustees had had to perform, and the skill and diligence exhibited in the performance of such duties. He reached the conclusion that the duties were light, that the trustees had assumed very little responsibility, that "the care, pains, and trouble were not acute or efficient," and that there could "not be said to be any skill or ability shewn by the trustees or any marked success—rather the opposite, as they failed to appreciate the accession of value consequent on the Eaton purchase, which, however, Miss Hughes correctly estimated." A perusal of the evidence does not lead me to the conclusion reached by the Master with reference to the skill and zeal manifested by the trustees: I cannot find any indication that they acted otherwise than as careful, diligent, and competent trustees would be expected to act. The evidence in the case is that taken in the Surrogate Court upon the passing of the accounts and the fixing of the compensation, after the Yonge street property had been sold and the cash portion of the purchase-money dis-

tributed, but while the trustees still held the mortgage for \$260,000 taken to secure a portion of the purchase-price. In so far as that evidence related to the part of the estate here in question, it was directed chiefly to the negotiations with the purchaser and to the advice given by the trustees to the *cestuis que trust* during the currency of those negotiations; but something was said by the witnesses about the earlier history of the property. It appeared that this piece of land, a short distance north of College street, and having a frontage of 60 feet on the west side of Yonge street, the principal asset of the trust estate, had not been very productive from the time when it came to the trustees in 1901, until the time of the sale in 1917, the buildings being old, and not such as would bring in a large rental; that as part of a larger parcel of land south of College street which he was buying for an undisclosed principal—what the Master in Ordinary called “the Eaton purchase”—Mr. H. H. Williams tried to buy some land owned by a bank; that the bank was willing to sell if Mr. Williams could procure for it another suitable piece of land; that Mr. Williams opened negotiations with the trustees which ultimately resulted in the sale of the property in question at the price of \$6,000 a foot frontage.

It is not necessary to go into the details of the negotiations; it suffices to say that the trustees, while they seem to have intimated to Mr. Williams that the price ought to be more than \$6,000 a foot, advised the *cestuis que trust* to sell for \$5,500, but that no offer was made to Mr. Williams because Miss Annie Hughes and those of the *cestuis que trust* who were guided by her thought that they ought to be paid \$7,000. Mr. Lonsdale, the trustees’ officer in charge of the negotiations, arranged with Miss Hughes to come to Toronto. When she came she and Mr. Lonsdale met Mr. Williams, who offered \$6,000. Miss Hughes refused to consider it; then after a week had gone by she decided to accept the offer. Before Mr. Williams could say whether he would renew his offer he had to wait for word from the owners of other land to whom he had cabled an offer; but finally he expressed his willingness to pay \$6,000, and the sale was closed.

I fail to see how this evidence justifies a holding that the trustees “failed to appreciate the accession of value” to the trust property. The question that presented itself when Mr. Williams

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opened the negotiations was not what the property was worth, but rather how great was the need of the bank. Miss Hughes was more willing than the trustees were to gamble upon the chance of finding another purchaser in case the bank refused to pay the price which she was ready to accept; but the trustees had to consider the interests of all the *cestuis que trust*, and I cannot but think that it would have been unfortunate for the estate as a whole to have lost a sale at \$5,500 a foot by holding out too long for a higher price. The imputation of want of capacity on the part of the trustees seems to me to be without foundation.

It is true, as the Master in Ordinary points out, that throughout their administration the trustees from time to time consulted the *cestuis que trust* as to questions presenting themselves for determination, and that certain applications were made for the advice of the Court; and in that sense it is true that the trustees did not assume any unnecessary responsibility; but that does not seem to be a reason for cutting down the trustees' remuneration. Perhaps a trustee who is in a position which compels him to take risks is entitled to more than usually favourable consideration when his remuneration comes to be fixed; but a trustee who abstains from taking unnecessary risks is not, for that reason, to be treated with unusual severity.

The finding that the care, pains, and trouble taken by the trustees were not "acute or efficient" represents, apparently, the Master in Ordinary's deduction from the facts already mentioned and some other facts to which he refers: for instance, the facts that the trustees did not improve the Yonge street property and did not know until they were about to convey the land that its frontage was some 8 inches (the reporter's notes of his judgment say 8 feet) more than it had been supposed to be. I do not find in any of the circumstances relied upon evidence of slackness upon the part of the trustees: it does not appear that there were funds which might conveniently have been used for erecting new buildings, or that it would have been wise to expend money for the purpose if it was available; and the evidence as to the measurements made by the trustees' officers, which resulted in the discovery that the frontage was a little more than 60 feet, seems to me to point to care rather than to indifference.

Upon the whole of the evidence it appears to me, as I have

already intimated, that the compensation ought to be allowed upon the footing of what an ordinarily careful and competent trustee is entitled to receive.

The trustees filed a claim in which it was suggested that the compensation ought to be arrived at by adding together a certain percentage of the \$260,000 for taking over and managing that portion of the estate, a certain other percentage of the same sum for transferring the mortgage to the Accountant, and a certain other percentage of the income received and disbursed; and, upon the argument, there was much discussion as to whether there ought or ought not to be the allowance, sometimes called commission, of the percentages claimed, or of any percentage upon the corpus.

Upon the one hand it was said that such a commission is allowed only when the trustee has "distributed" the estate, and that there has been no distribution here; upon the other hand it was said that the commission upon corpus is allowed to trustees who properly deal with the estate and hand it over, and that the trustees, having handed over the mortgage to the Accountant, as the nominee of the *cestuis que trust*, are entitled to such commission.

The trustees contrast the expressions used in *Re Berkeley's Trusts* (1879), 8 P.R. 193, with the expressions to be found in such cases as *Re Farmers' Loan and Savings Co.* (1904), 3 O.W.R. 837, and *Re McIntyre, McIntyre v. London and Western Trusts Co.* (1904), 7 O.L.R. 548, relied upon by the *cestuis que trust*. I incline to the view that if it was necessary to decide whether a commission might properly be allowed the decision ought to be in the affirmative. It seems to me that the word "distribute," as the expression is used in the cases cited, is really intended to convey the same idea as the expressions used in *Re Berkeley's Trusts*, and that these trustees have done what has been held in the cases to be sufficient to justify the allowance of a percentage on taking over and distributing the estate. However, I do not think it is really necessary to decide that point. It is true that the calculation of percentages upon the various parts of the estate and upon the receipts and disbursements of income is one of the means very often, perhaps usually, adopted of fixing a trustee's compensation: *Re Griffin* (1912), 3 O.W.N. 759, 1049, 3 D.L.R. 165;

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*Re Smith* (1916), 38 O.L.R. 67; and perhaps in the majority of cases it is the best means; but neither the trustee nor the *cestuis que trust* have the right to insist upon its adoption; what the tribunal before which the matter comes has to do is to ascertain as best it may what would be a fair and reasonable allowance for the trustee's care, pains, and trouble, and his time expended in and about the estate: The Trustee Act, R.S.O. 1914, ch. 121, sec. 67. As pointed out by Ferguson, J., in *Re Fleming* (1886), 11 P.R. 272, 426, at p. 278, the Court cannot be expected to ascertain, weigh, and set a value upon the actual work done in connection with the estate and properly so done, and to allow such value and no more; regard must, of course, be had to the size of the estate: *Re Toronto General Trusts Corporation and Central Ontario R. W. Co.* (1905), 6 O.W.R. 350. A sum which would be a reasonable allowance in the case of a small estate would often be quite unreasonably small in the case of a larger estate, although the work done in connection with the larger estate was no more than, or even less than, that done in connection with the small estate.

Now what is being dealt with in this matter is an estate of considerable size, handled by the trustees, as I think, with all due care and skill. The trustees have been allowed compensation, and I must assume the proper compensation, for their care, pains, and trouble and time down to a certain period, but in respect of a part only of the estate, or, as it may be said, upon the basis of the estate's being less by \$260,000 than it really is; and I view the question for determination as being: How much more shall be allowed in respect of the parts of the estate and in respect of the services that were left out of consideration in the Surrogate Court; or, in other words, by how much shall the compensation be increased because of the facts that the estate is so much larger than in the Surrogate Court it was treated as being, and that the trustees have had services to perform since the time of the award by the Surrogate Court? The Surrogate Judges allowed  $1\frac{1}{2}$  per cent. on the realisation of certain parts of the capital, 2 per cent. on the realisation of certain other parts, 1 per cent. on certain disbursements out of capital,  $2\frac{1}{2}$  per cent. on other disbursements of capital,  $2\frac{1}{2}$  per cent. on collection, and  $2\frac{1}{2}$  per cent. on disbursements of income, together with a small annual allowance for



management etc. In calculating the amount of that part of the capital which was to bear an allowance of 2 per cent. for realisation and 1 per cent. for distribution, there was included the cash realised from the sale of the Yonge street property; and, in calculating the amount of the income which was to bear the allowance of  $2\frac{1}{2}$  per cent. for collection and  $2\frac{1}{2}$  per cent. for disbursement, there was included the rent from the same property. As I have said, it was strongly urged upon the argument that the orders of the Surrogate Judges established a precedent which ought to be followed, and that I ought therefore to allow 3 per cent. upon the \$260,000 and 5 per cent. upon the interest collected and disbursed, and perhaps also an annual fee. But, as I have pointed out, the Surrogate Judges might or might not have made the allowances suggested. They did not think the allowance ought to be at the same rate in respect of all parts of the estate, as appears by the award of  $1\frac{1}{2}$  per cent. upon the realisation of certain parts of the capital and 2 per cent. upon the realisation of other parts. Doubtless if they had been dealing with the whole estate they would have allowed a sum in excess of what they did allow, and what it would have been right for them to do it is right to do now; but it does not follow that the scale of the additional allowance has been established. I am, therefore, unable to adopt the easy course that has been suggested. Moreover, I think 3 per cent. upon the \$260,000 together with 5 per cent. upon the income derived during the period with which I am dealing would be an unreasonable amount under all the circumstances. The fixing of any sum is more or less arbitrary—it must necessarily be so, even if what is done is merely to fix the rate of “commission” which should be allowed—but I have tried to fix upon a sum which, added to what was allowed in the Surrogate Court, will, on the one hand, serve as a recognition of the faithful administration of a trust of considerable magnitude, but of comparative simplicity, and, on the other hand, will not be more than reasonable *cestuis que trust* ought to be content to pay. Proceeding in that way I have reached the conclusion that \$4,000 would be a proper allowance, and accordingly I allow that sum.

The costs of the trustees and of the Official Guardian ought to come out of the trust estate.

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## RANDALL V. SAWYER-MASSEY CO. LIMITED.

*Sale of Goods—Contract for Sale of Motor-truck—Knowledge of Vendor of Purpose for which Truck Intended—Article Delivered not Reasonably Fit for Purpose—Finding of Trial Judge on Evidence—Truck Sold by Manufacturer as of his own Manufacture—Truck actually Manufactured by another—Implied Warranty—Property not Passing till Payment in Full—Right of Purchaser to Rescind Contract, Payment in Full not having been Made.*

The plaintiffs bought from the defendants, a manufacturing company, a motor-truck for use in the plaintiffs' business of carriers. The defendants were informed of the purpose for which the truck was required and the character of the work it would be put to, and they knew the character of the highways upon which it was to be used. The contract was in writing. The truck was described in the writing as a "Sawyer-Massey motor-truck." The price was \$5,600, \$1,000 of which was paid in cash; the balance was payable by instalments, for which the plaintiffs gave promissory notes. Each note, in addition to identifying the contract of sale and the subject-matter, provided that "the article for which this note is given shall remain the property of Sawyer-Massey Co. Limited until all notes or renewals given in settlement are paid in full."

*Held*, in an action for rescission of the contract, that the defendants must be regarded as having undertaken to furnish a truck suitable for the plaintiffs' purposes.

*Bristol Tramways etc. Carriage Co. Limited v. Fiat Motors Limited*, [1910] 2 K.B. 831, *Canadian Gas Power and Launches Limited v. Orr Brothers Limited* (1911), 23 O.L.R. 616, and *Alabastine Co. of Paris Limited v. Canada Producer and Gas Engine Co. Limited* (1914), 30 O.L.R. 394, followed.

And *held*, upon the evidence, that the truck was not, at the time of delivery, or afterwards at any time, reasonably fit for the purpose for which it was intended.

It appeared in evidence that the truck sold was not manufactured by the defendants, but was built for them by another company, and sold under the "Sawyer-Massey" name:—

*Held*, that, in the absence from the contract of specific words to the contrary, there is an implied warranty, in the nature of a condition or undertaking, where the vendor is a manufacturer, that the goods are of his manufacture. *Johnson v. Raylton* (1881), 7 Q.B.D. 438, followed.

And *held*, that there was a breach of this warranty or condition, the truck not being in any proper sense a "Sawyer-Massey motor-truck."

Judgment was given in favour of the plaintiffs declaring the contract rescinded and directing the return of the money paid and delivery up of the promissory notes in the defendants' hands.

ACTION for the rescission of a contract for the purchase by the plaintiffs and sale by the defendants of a motor-truck; for the return of money paid by the plaintiffs; and for damages.

The defendants counterclaimed for the amounts due upon promissory notes made by the plaintiffs and for the value of repairs made to the truck by the defendants.

The action was tried by LENNOX, J., without a jury, in Toronto.  
*R. McKay*, K. C., and *H. Howard Shaver*, for the plaintiffs.  
*S. F. Washington*, K. C., and *Kirwan Martin*, for the defendants.

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October 15. LENNOX, J.:—The plaintiffs were under contract to carry liquid air from Toronto to Hamilton, and required a 5-ton motor-truck to be used in their business as carriers. The defendants were informed of the purposes for which the truck was required and the character of the work it would be put to. The defendants must be taken to have been aware too of the character of the highways, as they were and would be likely to be in the season of 1917.

The contract is in writing and in the following terms:—

“Order-Specification.

“Date April 12th, 1917.

“Sawyer-Massey Co. Limited, Hamilton, Canada.

“Please enter order for Sawyer-Massey motor-truck, complete with standard equipment, according to price, terms, specifications, and conditions as follows:—

1	{	Model rated capacity 10,000 lbs., wheel base, 170"
Body	{	Style, High Stake
	{	Finish, colour dark green body with red wheels.
	{	Lettering.

Tires solid on front 36" x 5", rear 40" x 6" dual.

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“For which I agree to pay five thousand six hundred dollars (\$5,600.00) covering delivery f.o.b. Hamilton.....as follows: \$1,000 c.o.d. and the balance of \$4,600.00 to be covered by twelve notes, making balance payable in twelve equal monthly payments.

“Ship via.....deliver at factory.....on or about.....”

“Conditions and Guarantee.

“It is agreed as follows:—

“That this order shall not be binding until approved by an officer of the Sawyer-Massey Company Limited.

“That delivery promised is subject to strikes, accidents, fires, delays of transportation, or other causes beyond the reasonable control of the Sawyer-Massey Co.



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"That failure to accept and pay for the trucks above specified shall constitute a breach of contract by the purchaser, and that the Sawyer-Massey Co. may retain all money paid on account of this order as liquidated damages for failure to comply with the terms and conditions of this order

"That the Sawyer-Massey Company guarantees the trucks sold hereunder to be free from observable defects of material and workmanship and will furnish without charge, f.o.b. factory, any part or parts thereof which shall, within one year after delivery of truck to the original purchaser, be returned to the company, f.o.b. its factory, and which, upon examination, bear definite evidence of defect.

"That this guarantee shall not apply to any truck which shall be repaired or altered outside the company's factory in any way which, in the company's judgment, affects its stability or reliability; nor to any truck which has been operated at a speed exceeding the factory rated speed or loaded beyond the rated load capacity, or which has been subject to negligence, misuse, or accident.

"That the company does not guarantee tires, rims, ignition apparatus, lamps, signal devices, batteries, or other trade accessories, and is bound to the purchaser hereunder only to the extent of the guarantee made by the manufacturers of such accessories.

"That nothing omitted herefrom binds either party.

"Approved.

Geo. F. Randall.

"Sawyer-Massey Co. Limited.

A. E. Hager.

"By Thos. S. Depeer, Treas.-Sec. Address 454 Quebec Ave.,  
"Toronto."

"Witness: A. E. Henning."

As to the twelve promissory notes referred to, it is sufficient to say that each of them, in addition to identifying the contract for sale and subject-matter, provides that "it is also agreed that the article for which this note is given shall remain the property of Sawyer-Massey Co. Limited until all notes or renewals given in settlement are paid in full."

The plaintiff Randall claims to have had a long experience in running motor-cars. Before signing the order, he went to Hamilton and examined the truck, and it was taken up the Mountain road for trial. On this trial-trip Randall drove it part of the time. The operating power is a Continental six-cylinder engine.

There is no specification in the contract as to the type, make, or character of the motor by which the truck is to be operated, and it is not asserted that this was spoken of pending the contract. There is no reference in the contract to the Stegeman company.

The truck is factory-rated to carry a load of 5 tons at a speed of 10 miles an hour; and, when it left the factory, the governor was locked at a point to control the speed, and the key given to the plaintiffs. I regard the driver, Butcher, as an honest witness and accept his evidence in what he says as to the governor. Whether the company intended to lock it, or the witness who locked it thought it was locked, down to 10 miles an hour, is perhaps not quite clear; but it is certain, I think, that the governor was not at any time actually locked down to that speed. It was thus left to the purchaser to operate the truck at a greater speed than 10 miles an hour, but as to this and the loading, if they exceeded the rating, it is claimed they would do so at their peril. It certainly was capable of running at a speed greater than 10 miles an hour, locked as it was when it left the factory. According to the plaintiff Randall, the ordinary load carried was 75 liquid air cylinders or roundly 10,500 pounds, and on one occasion 76 cylinders or 10,640 pounds. It is not pretended that the speed did not exceed 10 miles an hour at times. This, I think, was where the highway was in good condition. The penalty specifically referred to in the contract for overloading or overspeed was that free repairs would not then be covered by the guarantee.

The truck was delivered and put into operation on the 18th April, and was constantly used thereafter—except when it was being repaired—until it was returned to the company on the 2nd November, and in that time had travelled about 11,000 miles. Until that time and even later, all parties hoped that the company would make it work satisfactorily, and it was retained and worked in that expectation.

It is said by Mr. Visick, called by the company, that it will cost \$1,500 to put it into fair condition. The contract price was \$5,600. There was another \$100 for extras, but it does not alter the situation. There is no evidence as to the life of such a truck, nor as to the speed at which 5-ton trucks may properly be driven. As to this, aside from the provisions of the contract in each case, a good deal must depend upon the condition of the highway. The

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motor in this truck was of the character used in touring cars; and capable of great speed. Defects developed, and there were breakages, of course; but Randall says that the first serious ground of complaint was in July. To be exact, his statement was:—

“In July there was bearing trouble. The electric system was never really any good. The generator would not charge. Two or three generators were put on. In July connecting rod and main bearings gave trouble—knocking. They were not fitted right.” (See exceptions from guarantee as to ignition and other trade accessories in last clause of contract.)

Subject to the effect of the evidence given by the company's manager at an adjourned sittings, the straight issue is : Was the truck reasonably fit for the purposes for which both parties intended it to be used? Or is the faulty condition complained of the result of the plaintiffs' failure to comply with the implied conditions of fair user upon their part—to overloading and overspeeding, want of ordinary supervision, operation when out of repair, failure to lubricate, inattention, incompetence, recklessness, and lack of reasonable and ordinary care?

It does not always follow that, because a purchaser acquaints the manufacturer or trader with the purposes to which he intends to put the subject of contract, that the vendor impliedly warrants its fitness or suitability. Evidence that he specifically described or that he selected what he wanted relying upon his own judgment may exclude the inference of an implied undertaking of suitability by the dealer or maker: *Canadian Gas Power and Launches Limited v. Orr Brothers Limited* (1911), 23 O.L.R. 616, at p. 621.

But I am of opinion and find as a fact that in this case the defendants were fully apprised of the purpose for which the truck was required, and, with this knowledge and with direct reference to the specific work in which the plaintiffs were then engaged, the daily journeys it occasioned, and the time within which the round trip must be accomplished from day to day, undertook to furnish a Sawyer-Massey truck reasonably suitable for the plaintiffs' work; and the decision as to this point turns upon the question: Was the truck furnished by the company reasonably fit for the purposes for which it was sold and purchased, within the principles recognised in such cases as *Bristol Tramways etc. Carriage Co. Limited v. Fiat Motors Limited*, [1910] 2 K.B. 831; *Canadian Gas*



*Power and Launches Limited v. Orr Brothers Limited*, above; and *Alabastine Co. of Paris Limited v. Canada Producer and Gas Engine Co. Limited* (1914), 30 O.L.R. 394, 8 D.L.R. 405, 17 D.L.R. 813? It is true that the Bristol case was decided under the English Sale of Goods Act, but in this, as in many instances, the statute is a crystallisation of the common law.

I do not, however, propose to rest my judgment solely or mainly upon the conclusions to be reached upon the double or alternative issue above set out; but, as it may become of consequence in the ultimate decision of the action, it is right that I should find the facts in so far as I can and express the view I entertain where I have not reached a definite conclusion as to other matters. I have already said that the truck at times carried a load exceeding 5 tons. I do not attach any weight to the rather peculiar and unconvincing evidence of Mr. Upton; and, without any suspicion that the witnesses Marchmont and Boyd were intentionally dishonest, it rather overtaxes my credulity to accept their evidence without important reservations. All the same, there is no doubt whatever that the truck was at times run at a rate exceeding 10 miles an hour where the highway was in good condition, and possibly at a speed greater than 12 miles an hour. I have said that I accept Butcher's evidence as to the governor and locking; in all his testimony he struck me as a straightforward, intelligent man. He was in a position and it was his business to know, and I have more confidence in what he said than what was said by any of these three men. As to Upton I do not think he intended to tell the truth. I think it is a proper inference or conclusion upon the whole evidence, including the time necessarily taken in making the round trips—though I do not recall that there was direct evidence as to this, except by Marchmont, who speaks of 2 miles an hour—that, upon parts of the highway over which in the contemplation of both of the parties the truck was to be operated, a speed of anything like 10 miles per hour was not and could not be attained. It is not in evidence, unless I accept the story of Upton, which I do not, that the average rate of speed for the round trip exceeded 10 miles an hour, and it is entirely clear to me that it was known to the defendants that what the plaintiffs required in their business and intended to purchase, and what the company undertook to supply, was a truck which,

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attended to and operated by one man and with time for necessary examination, adjustments, lubrication, etc., and such ordinary repairs as a driver would be expected to perform, would make the journey in an ordinary working day of 10 hours; and I am of opinion that the evidence, having regard to the unsatisfactory condition of the highway in places, the necessary slowing down at these points and in climbing hills, and the time taken up in unloading and for supervision, as referred to, the journey to and fro, of about 80 miles, could not be accomplished within the limits of 10 hours without occasionally running the truck on the completed portions of the highway at a speed exceeding 10 miles an hour; and, without endeavouring to determine the legal effect of this, if any, upon the rights of the parties—for my judgment will be based on other grounds—I am of opinion that the defendants contemplated this in entering into the contract as a condition that must arise and be yielded to in effectuating the purposes for which the purchase was made.

The truck was not kept in a polished or cleanly condition, and the fact that some of the bearings were cut, and perhaps had heated, may be evidence that these parts were not always carefully lubricated, or it might be attributable to original defective construction, fitting, adjustment, or alignment. The expert testimony does not appear to me to clear up the point satisfactorily either way—but, in any case, I am not of opinion that the repeated failure to “stand up to the work,” as it is expressed, or the ultimate and general “breakdown” of the truck, is assignable to want of care.

Aside altogether from the question of whether what the company delivered can be properly described as a 5-ton truck, I am definitely of opinion that, taking into account the character and requirements of the plaintiffs’ business, the specific daily journey to be made, the time reasonably available for making it, and generally the surrounding circumstances, including the object of the purchase, all present to the mind of both parties pending the contract, the truck, with careful supervision and efficient operation, was not, at the time of delivery, or afterwards at any time, reasonably fit for the purposes for which it was intended.

Upon the technical but relevant and intensely important question of whether this truck should be classified as a 5-ton or only

as a 4-ton truck, I have not been able, even with the aid of expert testimony, to come to a definite or final conclusion. Unexplained, the subsequent cataloguing or publication of a truck, with the same specification as to motive power as a 4-ton truck, would strongly support the inference that there was intentional misrepresentation or honest mistake at the time of the contract in question. The reputation of this company prevents me from thinking that they intended to commit a fraud, and a verbal explanation was attempted. The explanation, however, was not convincing, and it has not dispelled the impression created by the inherent probability that the representation and sale were made at a time when the truck, in so far as the defendants are concerned, had only reached the experimental stage, that the experiment failed, and, the experiment failing, the truck, as a matter of honesty, was reclassified as a 4-ton truck.

This last is, at best, an inference only, possibly ill-founded; or it may be only an unreasonable conjecture.

If I am right in the finding above set out, to the effect that the truck was not reasonably fit for the purpose for which it was intended, the plaintiffs are entitled to some relief—rescission and damages if the property in the truck remained in the company, or damages only if it had passed to the plaintiffs: But I prefer to base my judgment on what was disclosed by the company's manager almost at the conclusion of the trial. Mr. DeWitt Palmer, the general manager, said:—

“It was a Stegeman truck—built for the Sawyer-Massey Company by the Stegeman company, and sold under the Sawyer-Massey name.”

“Stegeman literature was used in connection with the sale.”

“There was a contract entered into with the Stegeman Motor Car Company of Milwaukee, Wisconsin, to build their standard line of trucks under the Sawyer-Massey name for sale by the Sawyer-Massey Company in Canada. They had been building trucks there for seven years.”

“His Lordship: Q. You are asked, was it a Sawyer-Massey truck? A. Absolutely—the only Sawyer-Massey truck there is.

“Q. Then there is none? A. It was not manufactured by the Sawyer-Massey Company.

“ Mr. McKay: Q. Then there was not a Sawyer-Massey

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truck in existence when the contract was made? A. Not made by the Sawyer-Massey Company.”

The question which elicited the first statement has not been forwarded, but, with my notes and recollection of the evidence, I do not need it. It is very like keeping the best wine for the end of the feast. The question now becomes one of identity—is it the species or kind of thing contracted for— and, where the question arises, it is an initial question and goes directly to the root of the litigation. I have not changed the opinion I entertained when I heard Mr. Palmer's evidence, that there is and should be no exception to the rule of law that no *ab initio* obligation is imposed upon a contractee, be the contract ever so formal, without identity of subject-matter and vendor. The vendor may enjoy a world-wide reputation, enhancing the value of his products, or the thing itself may be as good or vastly better than the thing contracted for; it matters not; under such a contract, *per se*, the contractee cannot be compelled to deal with a substituted vendor or to accept goods, however good, that he did not bargain for. Cases there are where the purchaser has been denied the right of repudiation, and cases there may be where in the end he will have to pay as much as the stated consideration, but they are not exceptions—they are modifications only, arising out of moral necessity where there has been subsequent acceptance, adoption with knowledge, or the property has passed. In this case there has been no change of ownership, the property in the truck has not passed; for, by the contract, “it is also agreed that the article for which this note is given shall remain the property of Sawyer-Massey Co. Limited until all notes or renewals given in settlement are paid in full.” All the promissory notes are in the same terms; 8 of the 12 are unpaid; and this provision is specifically invoked by para. 6 of the defence.

I asked counsel at the conclusion of the evidence to submit authorities, and then or subsequently intimated that I would allow any necessary amendment of the pleadings. Mr. Washington informs me that he can find no authority, and refers me to questions 122 to 131, inclusive, of Randall's examination for discovery, as shewing that the truck agreed to be purchased was a Stegeman truck. He asks that these questions and answers be put in. I think these answers should be filed and with them

explanations or modifications, if any, appearing in other parts of the examination. I make the examination exhibit 23. It is, as Mr. Washington says, "a question of fact," and the question is: Was the truck in question in any proper sense a Sawyer-Massey truck? The company are a manufacturing company—a home company with an established reputation for their workmanship, material, and output. There was the element of accessibility and a reasonable guarantee of a continuance of the business with the ability to obtain necessary repairs: an important consideration where repairs and renewals are a necessary incident of operation.

Mr. McKay refers me to authorities, analyses the contract, and asks to amend. I allow the amendment; and, agreeing with his argument without repeating it, it is enough to say that every word of the written contract is in conflict with the proposition that the plaintiffs agreed to purchase the product of a foreign manufacturer; and the writing is the safest evidence. It is a condition of the contract "that nothing omitted herefrom binds either party." It is contrary to the construction put upon the agreement in the statement of defence, "one of the defendants' No. 1 model" (para. 2). Assembling the units is another question, so long as it can still be said that the finished product is of the manufacture represented. It is sometimes difficult to trace the boundary. Is this a case of uncertain boundary-line? "It was a Stegeman truck," says Mr. Palmer, "built for the Sawyer-Massey Company by the Stegeman company, and sold under the Sawyer-Massey name . . . There was a contract entered into with the Stegeman Motor Car Company of Milwaukee, Wisconsin, to build their standard line of trucks under the Sawyer-Massey name for sale by the Sawyer-Massey Company in Canada. . . . It was not manufactured by the Sawyer-Massey Company." It would have been prudent and honest for the company to have said, "We are the agents for the sale in Canada of the Stegeman trucks," for that is what the transaction amounted to, stripped of its frills. The arrangement deposed to was, no doubt, a perfectly legitimate method of disposing of a part of the Stegeman output, if followed by disclosure of the essential facts and a properly worded agreement. Were not the defendants in effect the agents of the American company? How does the transaction as it is differ from every-day sales by implement agents, who pay cash

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for the goods as they are delivered at their warehouses, except by the absence of honest disclosure; would such an agent satisfy his agreement to sell and deliver a Cockshutt plough by delivery of one manufactured by the Fleurys, or *vice versa*, unless the contract could be said to have been varied by acceptance with knowledge or some equivalent act? I do not want it to be inferred that, in my opinion, the defendants were consciously dishonest. I am not of that opinion; but, all the same, the transaction was legally dishonest, if it was in fact for the sale of a Sawyer-Massey truck in the sense in which I construe the company's own carefully prepared writing—a printed document intended to be signed by all purchasers, a course of business deliberately entered upon, "on the defendants' customary form," as stated in para. 2 of the defence.

I suppose Mr. Washington means that the answers put in shew that the plaintiffs intended to buy a Stegeman truck. If the plaintiffs intended to buy and the defendants agreed to sell a truck manufactured by the Stegeman company, the agreement of the defendants does not say so: to the contrary, in every line, it points in unmistakable terms to "the factory" at Hamilton as the place of manufacture and the defendants as the manufacturers of the truck and of all its parts, "trade accessories" only excepted. And the exception of "trade accessories" emphasises, if emphasis is possible, the kind of truck the company agreed to furnish. The onus is on the company as to this issue. I cannot accept the equivocal, argumentative, and conjectural statements of Randall, although a plaintiff, to contradict or vary the written contract. In the absence of specific words in the contract to the contrary, there is an implied warranty, in the nature of a condition or undertaking, where the vendor is a manufacturer, that the goods are of his manufacture: *Johnson v. Raylton* (1881), 7 Q.B.D. 438.

As to the necessity of identity of species as distinguished from mere questions of quality, the law is well-defined, and is fully reviewed and brought down to date by the Chief Justice of Ontario in the *Alabastine* case (above), where the learned Chief Justice illustrates the principle by the difference—a substantial difference in kind—as decided in *Wallis Sons & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003, [1911] A.C. 394, between giant sanfoin and common English sanfoin. The same principle was recognised



and given effect to in *Azémar v. Casella* (1867), L.R. 2 C.P. 431, 677, where the attempt was to substitute western Madras cotton for long-staple Salem cotton. The *Alabastine* case, too, covers all that need be said as to the implied condition of fitness, notwithstanding elaborate provisions that nothing is to be implied.

The plaintiffs gave notice of rescission, and ask for a declaration that they were entitled to rescind. To be accurate, there was no agreement for sale of the truck the parties have been fighting about; but, as there is no Sawyer-Massey truck in existence, in the sense in which I construe the alleged contract, there is no practical objection to a declaration as asked. They do not in terms ask for a delivery up of the promissory notes, but it follows that they are entitled to them, if they are entitled to have back the money paid. They ask for damages, and they have sustained substantial loss by being unable to carry out their arrangement with the Liquid Air Company—I do not understand that it was a binding contract for a definite time—and moneys paid out for travelling expenses, etc. Ordinarily some moderate sum for damages should be allowed, as in the *Alabastine* case. But there is another side to this—the plaintiffs had the use of the company's truck and earned profits, if profits there were, in their business for 5 or 6 months, and I should have felt considerably embarrassed if Mr. Washington had asked, alternatively, to have an allowance in respect of this; not as to what I ought to do if I could make law for each case as it comes before me, but as to what I have power to do in such case. But I am not embarrassed as to this, for I was not asked. Under the circumstances I think it would be inequitable to allow damages. But a higher Court may be of opinion that I should have allowed damages, and I will assess them contingently. The evidence is rather meagre as to this, and there is no direct evidence as to the benefit the plaintiffs derived from the use of the truck. If the countervailing advantage from user cannot be taken into account, I would assess the damages at \$450; if it can, and as I think ought to, be taken into consideration, the plaintiffs, if entitled to damages, should not have more than about \$50.

The defendants counterclaim for the amounts unpaid on the promissory notes, with interest, and for repairs, and at the trial asked to amend by including a claim for the use of another truck

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while the one in question was out of action, and, I think, for repairing it. I allowed the amendment, or intimated that I would allow it if it appeared proper to do so after hearing the evidence. It is immaterial which way it was, as I would not in any event, upon the evidence, allow anything under that heading. I am of opinion that it was given to be used as a substitute for the time being for the truck the defendants undertook to supply, and was not improperly handled by the plaintiffs. The main counterclaim, including claim for repairs, fails, as a consequence of the judgment for the plaintiffs.

There will be judgment for the plaintiffs rescinding the contract in question, and for the recovery of the several sums of money, whether for principal or interest, paid on account thereof, with interest on the total of each payment from the date of payment, and for the delivery up for cancellation of the promissory notes in the defendants' hands, with the costs of the action, and dismissing the counterclaim with costs.

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Oct. 16.

WADE V. JAMES.

*Assignments and Preferences—Assignment for Benefit of Creditors—Sale of Assets of Insolvent Estate by Assignee to Creditor—Inspector of Estate—Constructive Trustee—Resale at Profit—Judgment Directing Account of Profits—Proof of Sale and Delivery of Goods and Solvency of Purchasers—Right to Recover Purchase-price—Inability of Purchasers to Set up Defect in Vendor's Title—Effect of Consent Judgment Dismissing Action upon Promissory Notes Made by Purchasers.*

Insolvent traders made an assignment for the benefit of their creditors. J., a creditor of the insolvents, was an inspector of the estate; he bought from the assignee the assets of the estate for \$3,587, and (contemporaneously) sold them to the wives of the insolvents for \$5,500—\$1,500 cash and \$4,000 secured by the promissory notes of the purchasers. J. and his partners, the defendants, were adjudged, in an action brought by the assignee, to account for the profits, if any, made by them out of the purchase of the assets:—

*Held*, that when J. received the assets he became a constructive trustee, but that did not prevent him from selling the goods; and the purchasers could not successfully defend an action for the recovery of the price they agreed to pay. When the plaintiff proved that the goods were sold and delivered, and that the purchasers were solvent, he established a *prima facie* case; and the defendants were not entitled to say that they could make no profit because no recovery of the purchase-price was possible; the purchasers could not set up a defect in the title of their vendor.

The defendants had brought an action against the purchasers upon their promissory notes, and that action had been dismissed, but the dismissal was by the consent of the defendants, the plaintiffs in that action; the dismissal established nothing in favour of the defendants unless they shewed, which they did not, that some secret arrangement for payment had not been made when they consented to the dismissal. And, therefore, the Master had rightly found that the defendants had made a profit of \$1,739.25.

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AN appeal by the defendants from a report of the Master in Ordinary.

The action was brought by the assignee for the benefit of creditors of Krieger Brothers, insolvents, for an account.

The defendant Philip James was a member of a partnership known as the Toronto Clothing Manufacturing Company, creditors of the insolvents, and was an inspector of the estate of the insolvents. He bought from the plaintiff the stock of goods of the insolvent estate for \$3,587, and, contemporaneously, sold it to the wives of the insolvents for \$5,500—\$1,500 cash and \$4,000 secured by promissory notes from the purchasers.

By the judgment in the action, the defendants, Philip James and his partners, were directed to account for the profit made or to be made by them out of the transaction.

The Master found that the defendants' profit amounted to \$1,739.25; and the appeal was from that finding.

October 10. The appeal was heard by MASTEN, J., in the Weekly Court, Toronto.

*I. F. Hellmuth*, K.C., for the defendants, the appellants.

*A. C. McMaster*, for the plaintiff, respondent.

October 16. MASTEN, J.:—Philip James, a member of the defendant firm, creditors of the insolvents, being at the time an inspector, bought from the plaintiff the stock of the insolvent estate for the sum of \$3,587, and, contemporaneously, sold it to the debtors' wives for \$5,500, being \$1,500 cash and \$4,000 secured by promissory notes from the purchasers.

By the judgment the defendants are directed to account for the profit, if any, made or to be made by them out of the purchase of the insolvent estate in question.

The Master has found that such profit amounts to \$1,739.25; and the defendants appeal from that finding, contending that no



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profit was made or to be made, because no recovery is possible in law by the defendants against the purchasers, and they cite *Hochberger v. Rittenberg* (1916), 36 D.L.R. 450, at p. 452, and *Grant v. Gold Exploration and Development Syndicate Limited*, [1900] 1 Q.B. 233.

In answer to this contention of law, the plaintiff, the respondent, refers to *Day v. Day* (1889), 17 A.R. 157, and *Shaw v. Jeffery* (1860), 13 Moore P.C. 432, at p. 455.

On the law I agree with the respondent's contention. When Philip James, being an inspector, received these goods, he became a constructive trustee, but that did not prevent him from selling the goods, and he did sell and deliver them, and his action against the purchasers would be for the price of goods sold and delivered. The goods have actually been received and disposed of by the purchasers, and it seems to me that the purchasers would be quite unable to set up any defect in the title of their vendor. I fail to see how the purchasers can as matter of law successfully defend an action for the recovery of the price they agreed to pay. But in my opinion there is no evidence in fact to meet the respondent's *prima facie* case. The respondent proves that the goods were sold and delivered, and that the purchasers were solvent. Surely this is sufficient to render the appellants *prima facie* liable to account for the profit which they, as constructive trustees, made in the transaction. The dismissal of the appellants' action on the \$4,000 notes establishes nothing.

It seems to me a significant fact that the appellants did not give any evidence before the Master; they did not choose to go into the box or prove that, as a term of the consent given by them to a dismissal of their action on the \$4,000 promissory notes, they were not contemporaneously paid in full, or that arrangements were not made by which they would hereafter be paid in full when this present litigation comes to an end. I think the respondent's *prima facie* case compelled the appellants to negative these suggestions.

In my opinion the appeal fails, and must be dismissed with costs.

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[MASTEN, J.]

HENDERSON v. STRANG.

*Company—Action by Shareholder for Declaration that Agreement between Company and another Shareholder Illegal—Style of Cause not Shewing that Plaintiff Suing on Behalf of other Shareholders—Amendment—Improvvidence—Fraud—Consideration—Election of Directors—Loan by Company to Shareholder—Ultra Vires—Companies Act, R.S.C. 1906, ch. 79, sec. 29, sub-sec. 2—Status of Shareholder—Payment for Shares—Acceptance of Cheque—Evidence—Share-register—Partnership not Separate Entity—Deposit of Money—“Loan”—Relief—Injunction—Repayment to Company of Money Lent.*

The plaintiff, a shareholder in an incorporated company, sued W. S., W. S. & Son, and the company for a declaration that a certain agreement, dated the 24th August, 1910, and a loan of money made by the company to W. S. & Son, were illegal, and for repayment of the money to the company:—

*Held*, that the plaintiff must be taken to be suing alone, inasmuch as she had not in the style of cause proclaimed herself as suing on her own behalf and on behalf of all other shareholders of the company; but that she should be permitted to amend so as to claim in a representative capacity.

(2) That 510 shares of the stock of the company allotted to W. S. had been paid-up in full, the company having legally accepted a cheque in payment; and, even if the shares were not paid-up, the plaintiff could not maintain an action for recovery of a balance due from a shareholder to the company in respect of his shares—the company would be the only proper plaintiff.

*Burland v. Earle*, [1902] A.C. 83, *Bennett v. Havelock Electric Light Co.* (1911), 25 O.L.R. 200, and *Allen v. Hyatt* (1914), 17 D.L.R. 7 (P.C.), followed.

(3) That the plaintiff could not attack the agreement on the ground that the company was not bound by it because it was improvident; such an agreement can be attacked by a shareholder only if the agreement is fraudulent and constitutes a fraud upon him.

(4) That, upon the evidence, there was consideration to the company for the agreement.

(5) That a board of directors of the company was properly elected on the 24th August, 1910, and that there continued to be a proper board to carry on the affairs of the company from that time on.

(6) That the agreement was *ultra vires* by reason of the fact that it was for a loan from the company to one of its shareholders of money belonging to the company, in contravention of sec. 29, sub-sec. 2, of the Canadian Companies Act, R.S.C. 1906, ch. 79.

The 510 shares were the property of W. S.; the share-register shewed that, and it must govern, unless definitely proved to be incorrect or false, which was not the case; and, even if the shares were the property of the firm of W. S. & Son, of which W. S. was a member, the firm was not a separate entity; and, when the loan was made to W. S. & Son, it was made to W. S. and his partners.

The depositing of the money with W. S. & Son constituted a lending to them, upon the principle, well-established in the case of banks, that a deposit of money makes the depositee not a bailee but a debtor.

(7) That the plaintiff was entitled to maintain the action to prevent the company from doing something *ultra vires*; and, as a necessary incident, the Court should direct the repayment of the money lent.

*Russell v. Wakefield Waterworks Co.* (1875), L.R. 20 Eq. 474, 481, followed.

ACTION by Mary H. Henderson against William Strang, William Strang & Son, merchants, of Glasgow, Scotland, and J. B.

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Henderson & Company Limited, for relief in respect of transactions between the defendants the Strangs and the defendant company, in which the plaintiff was a shareholder.

May 22 and 24. The action was tried by MASTEN, J., without a jury, at a Toronto sittings.

*I. F. Hellmuth*, K.C., and *Grayson Smith*, for the plaintiff.

*D. L. McCarthy*, K.C., and *A. W. Langmuir*, for the defendants.

October 16. MASTEN, J.:—This is an action which came on for trial before me at the non-jury sittings in Toronto on the 22nd May last. Evidence was heard on that date and was concluded on the 24th. Argument was to be heard at a later date, but, by agreement of counsel and with my concurrence, written arguments were put in. These were not completed until the present month of October.

The plaintiff sues as a shareholder of J. B. Henderson & Company Limited, a company incorporated under the laws of Canada. She is the holder of 10 shares of stock, of the nominal value of \$1,000, fully paid. By the style of cause, as above indicated, the plaintiff sues individually and personally on her own behalf only, and not on behalf of or as representative of other shareholders, though in paragraphs 8, 9, 11, 12, 13, 15, and 17 of the statement of claim she proffers allegations as on behalf of other shareholders as well as herself; but the several claims of the prayer for relief are personal to the plaintiff solely.

The written argument delivered for the plaintiff opens by stating that "the plaintiff sues on behalf of herself and all other shareholders of J. B. Henderson & Co."

In their argument in answer the defendants submit "that the plaintiff sues alone, inasmuch as she has not in the style of cause proclaimed herself as suing 'on her own behalf and on behalf of all other shareholders' of J. B. Henderson & Company Limited." And they refer to *In re Tottenham*, [1896] 1 Ch. 628; *Township of Barton v. City of Hamilton* (1909), 13 O.W.R. 1118, 1128; and *Harris Maxwell Larder Lake Mining Co. v. Gold Fields Limited* (1911), 23 O.L.R. 625.

I think the contention raised by the defendants is well taken; and, while I have no recollection or note of the position said by



counsel to have been taken for the plaintiff at the opening of the case, declining to amend, yet the recollection of counsel is very likely to be correct; none the less, I think, I ought now to permit the plaintiff to amend the style of cause if she is advised so to do; and therefore if, before judgment issues, application for leave to amend is made, the style of cause may be amended so that the plaintiff may claim in a representative capacity.

Out of a somewhat luxuriant jungle of assertions of fact, declarations of law, and prayers for relief developed in the evidence and pleadings, there appear to emerge, by way of the plaintiff's argument, 6 distinct claims:—

(a) That 510 shares of stock in the defendant company duly applied for and allotted to the defendant William Strang have not been paid-up, though calls of \$100 per share have been duly made on the same.

(b) That an agreement (exhibit 30)\* dated the 24th August, 1910, made between the defendant company and William Strang,

\*The agreement recited that J. B. Henderson & Company Limited (called "the company") had been incorporated in Canada by letters patent under the Companies Act, R.S.C. 1906, ch. 79, with a capital stock of \$100,000, divided into 1,000 shares of \$100 each; that the shares had been divided into 490 preference shares of \$100 each, carrying a cumulative preferential dividend of 6 per cent. per annum, and being also entitled to rank *pasi passu* with the ordinary shares on the surplus profits remaining, and 510 ordinary shares of \$100 each, all the said preference and ordinary shares ranking *pasi passu* on the free assets in the event of a winding-up; that 297 of the preference shares had been issued, and the 510 ordinary shares had been issued to William Strang and fully paid-up; that it had been agreed the company and the members of the firm of William Strang & Son (called "the merchants") that \$51,000, the amount paid-up on the ordinary shares, should be deposited by the company with and held by the merchants as cover and security for the company's current account with the merchants as aftermentioned, the said deposit being free of interest; that it had been further agreed that the company should pay to the merchants interest at the rate of 6 per cent. per annum upon the amount of all sums withdrawn by the company from the said sum of \$51,000 from the dates of the several withdrawals respectively, and further that the company should pay interest at the same rate on the amount of all purchases made by the company from third parties in Great Britain and Ireland or the Continent of Europe, through the merchants, from the date of payment by the merchants for the same, and also on the amount of all purchases made by the company from the merchants of the goods, wares, and merchandise manufactured by the merchants; provided, however, that interest should not run on the amount of such purchases from the merchants themselves until the expiry of 60 days from the first day of the month next following the date of the several invoices, and that the merchants should allow the company interest at the same rate upon all payments made by the company over and above the said deposit of \$51,000 in respect of such goods from the date of the receipt of each payment.

In consideration of the premises and the agreements recited, the company agreed forthwith to deposit with the merchants for the purpose aforesaid the said sum of \$51,000 free of all interest, and the merchants agreed that they

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A. S. Strang, James Strang, R. W. Strang, and J. N. Strang, trading under the name, style, and firm of William Strang & Son, is *ultra vires* of the defendant company, because it is extremely improvident on the part of the company.

(c) That there was no consideration to the company for the above agreement.

(d) That since the 24th August, 1910, there has been no proper board of directors to manage the affairs of the defendant company, and its acts since that date are illegal.

should hold the same for and on behalf of the company as cover and security for all sums paid and to be paid by the merchants to or for account of the company and the price of all goods sold and to be sold by the merchants to the company and interest on such sums and prices, and the merchants covenanted and agreed with the company that they would pay or credit interest at the rate of 6 per cent. *per annum* to the company upon all sums received over and above the said \$51,000 by the merchants from the company from the respective dates of the receipt thereof, and that they would from time to time pay out the said sum so deposited with them as directed by the company and honour the company's cheques, orders, and drafts all to the extent of the balance remaining due to the company from time to time after deducting all sums paid to or for account of the company and the price of all goods sold to or for account of the company and the price of all goods sold to the company and interest, all as aforesaid.

The company also covenanted and agreed with the merchants that the company would remit and pay to the merchants from time to time, on receiving advices thereof, the amounts paid by the merchants for goods purchased by the company as aforesaid, and the prices of all goods, wares, and merchandise sold to the company by the merchants, and that the company would also from time to time pay interest at the same rate to the merchants on the amount of all sums withdrawn by the company from the said sum of \$51,000, from the date of each withdrawal, on the prices paid by the merchants to third parties for goods purchased for the company as aforesaid from the date of each payment, and on the price of all goods, wares, and merchandise purchased by the company from the merchants from the date of the expiry of 60 days from the first day of the month next succeeding the dates of the several invoices of the said goods, and that the company would duly accept and at maturity honour any drafts or bills of exchange which the merchants might draw upon them for the amounts of sums so withdrawn or advanced by the merchants in excess of the said deposit of \$51,000.

And it was further agreed between the company and the merchants that, on the 31st December in each year, an account of the dealings between the parties should be taken and the interest as before provided computed and the balance of the principal and interest at the foot of such account should be forthwith paid over to the party in whose favour such balance should be shewn by the said account to be, the said deposit of \$51,000 being left in the hands of the merchants and excluded from the annual settlement; provided that if in any year the net profits of the company, after providing for the interest payable to the merchants on all sums advanced by them in excess of the deposit of \$51,000 (which interest should be paid in full) should not be sufficient to pay both the preferential dividend on the preference shares issued at the time and the interest due to the merchants as before provided on the sums withdrawn from time to time by the company from the said deposit, only a payment at the same rate per cent. should be made to account of the preferential dividend and of the said last mentioned interest, and the balances of each should be accumulated and carried forward as charges on the net profits of succeeding years (no interest being credited thereon) and on the free assets of the company in the event of a winding-up.

(e) That the agreement (exhibit 3G) described above is *ultra vires*, by reason of the fact that it constitutes a loan from the company to one of its shareholders of money belonging to the company, in contravention of sec. 29, sub-sec. 2, of the Canada Companies Act, R.S.C. 1906, ch. 79.

(f) That the agreement in question never became binding, because the plaintiff received no notice or inadequate notice of the meeting of shareholders of the 24th August, 1910, at which it was approved.

I deal with these points in the above order:—

(a) I am of opinion that these shares were, under the circumstances disclosed, paid-up in full, not in cash, for the proceeds of the cheque were not at the time placed at the free disposal of the company, but the cheque was accepted as payment, and there is no suggestion that it is not the equivalent of \$51,000, or that William Strang & Son are not debtors in that sum to the company and able to pay it.

If the former provision of the Canadian Companies Act, R.S.C. 1886, ch. 119, sec. 27, were in force, there might be difficulty; but, as the Act now stands, it seems to me that the cheque of William Strang was legally accepted in payment of the shares.

Apart from this difficulty, I am unable to see how the plaintiff can maintain an action for recovery of a balance due from a shareholder to the company in respect of his shares. The rule is that in any proceedings brought to redress a wrong done to the company, or to recover moneys or damages alleged to be due to the company, or to enforce the rights of the company, the company is the only proper plaintiff: *Burland v. Earle*, [1902] A.C. 83; *Allen v. Hyatt* (1914), 17 D.L.R. 7 (P.C.); *Bennett v. Havelock Electric Light Co.* (1911), 25 O.L.R. 200.

(b) No authority is cited to me in support of the claim that a company is not bound by an agreement where it is improvident, or that such improvidence constitutes a ground for holding the contract to be *ultra vires*. In my opinion, it does not, as a matter of law, afford a ground for so holding. Upon the facts the evidence is conflicting as to whether the agreement in question is improvident or not; and I should be quite unable to find that it was so. In any case, however, as I understand the law, such an agreement can be attacked by a shareholder only if the agree-

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ment is fraudulent and constitutes a fraud upon him; but no such case is made out here.

(c) I find as a fact that there was consideration to the company for the agreement in question, and that the cheque of William Strang, when transmitted to William Strang & Co., was used to the advantage of the company and constituted a consideration.

(d) I am of opinion that the board of directors was properly elected on the 24th August, 1910, and that there continued to be a proper board of directors to manage the affairs of the defendant company from that time on; I incline to the view that, at the subsequent meetings where William Strang was elected by the shareholders as president, the minutes are sufficient to constitute him a director; but, even if that were not so, the old board of directors, elected in 1910, remained effectively in office.

(e) I find that the agreement (exhibit 30), described above, is *ultra vires* by reason of the fact that it constitutes a loan from the company to one of its shareholders of money belonging to the company, in contravention of sec. 29, sub-sec. 2, of the Canadian Companies Act, R.S.C. 1906, ch. 79. I do not accede to the contention put forward on the part of the defendants that the 510 shares in question were in reality the property of William Strang & Son and not of William Strang. The share-register of the company is produced, and must govern, unless there is definite evidence shewing it to be incorrect or false; and, so far from that being the case, the evidence all corroborates the entries in the share-register and indicates that William Strang is a shareholder in the company.

But I am of opinion that William Strang & Son is not an entity; it is not the name of a corporation; it is the short name for William Strang, A. S. Strang, James Strang, R. W. Strang, and J. N. Strang, carrying on business in partnership. In English law a firm is not a person. As was said in *Rex v. Holden*, [1912] 1 K.B. 483, at p. 487, the firm name is not in itself the name of any person other than the partners, because, in the words of Farwell, L.J., in *Sadler v. Whiteman*, [1910] 1 K.B. 868, at p. 889, "the fallacy is to say that a partner in a firm does not, but the firm does, carry on business. In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partner-

ship business; the firm name is a mere expression, not a legal entity, although for convenience under Order XLVIII. A it may be used for the sake of suing and being sued."

When the loan was made to "William Strang & Son," it was made to William Strang along with his partners; and, in my view, comes within the prohibition contained in the words of sec. 29, sub-sec. 2, of the Act, "A company shall in no case make any loan to any shareholder of the company."

I am further of opinion that the deposit of this money with William Strang & Son constituted a lending of the money to them. The principle is well-established, in the case of banking deposits, that a deposit with a bank constitutes the bank not a bailee but a debtor owing the customer the amount so deposited; and that, I think, is the substance of the present arrangement. The cheque of William Strang went to William Strang & Son, was received by them, and is admitted to be on deposit with them, and they are liable to pay over the money on demand by the company. Under the circumstances it appears to me that the transactions constitute a lending of this money to William Strang and his partners.

Then is the plaintiff entitled to sue? I understand the rule to be that statutes expressly prohibiting loans to shareholders are deemed to be intended solely for the company's benefit, and therefore do not prevent the corporation from enforcing a loan made in violation of the statute; and, further, that if an individual incorporator sues a corporation to prevent it from doing something *ultra vires*, e.g., to restrain it from carrying out an agreement with a third party, and joins the third party as a defendant, then, as a necessary incident to the first part of the relief claimed, the Court will go on to direct the repayment of the money or restoration of the property bought or disposed of under the agreement: *Russell v. Wakefield Waterworks Co.* (1875), L.R. 20 Eq. 474, at p. 481.

If I am right in this view it becomes unnecessary to dispose of objection (f), namely, that the agreement in question never became binding because the plaintiff received no notice or adequate notice of the meeting of shareholders of the 24th August, 1910, at which it was approved; but I find, by reference to the minutes, that the plaintiff was present by proxy at that meeting and approved of the ratification of the agreement.

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There will therefore be judgment declaring that the loan of \$51,000 made by the defendant company to William Strang & Son was illegal, restraining the company from acting further under the terms of the agreement of the 24th August, 1910, and directing the defendants William Strang & Son to repay to the company the sum of \$51,000, with interest at 5 per cent. from the date when it was received. The plaintiff will be entitled to the general costs of the action, having regard to the basis on which she succeeds, and the defendants will be entitled to the costs of those issues upon which they succeeded, to be set off against the plaintiff's costs.

[An appeal from the judgment of MASTEN, J., has been entered for hearing.]

## [APPELLATE DIVISION.]

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*Company—Directors—Personal Liability for Wages of "Labourers, Servants and Apprentices"—Companies Act, R.S.O. 1914, ch. 178, sec. 98 (1)—"Servant"—Actress Employed by Theatrical Company.*

An actress engaged by a theatrical company (incorporated under the Ontario Companies Act, R.S.O. 1914, ch. 78), at a weekly salary, under a written contract, to play such parts as might be assigned to her, is not a "servant" of the company within the meaning of sec. 98 (1) of the Act, which provides that "the directors of the company shall be liable to the labourers, servants and apprentices thereof for all debts not exceeding one year's wages due for services performed by the company while they are such directors respectively."

*Welch v. Ellis* (1895), 22 A.R. 255, followed.

Judgment of DENTON, Jun. Co. C.J., York, affirmed.

AN action in the County Court of the County of York by an actress who was employed by the Canadian National Features Limited, an Ontario company, to recover from the defendants, as directors of that company, the amount of a judgment recovered by her against the company for wages: Ontario Companies Act, sec. 98.\*

\*98.—(1) The directors of the company shall be jointly and severally liable to the labourers, servants and apprentices thereof for all debts not exceeding one year's wages due for services performed by the company while they are such directors respectively.



May 20. The action was tried by DENTON, JUN. Co. C.J., without a jury.

*R. T. Harding*, for the plaintiff.

*M. H. Ludwig*, K.C., and *B. W. Essery*, for the defendants *Wills*, *Brownridge*, *Feighen*, and *Cranston*.

*Gideon Grant* and *F. E. O'Flynn*, for the defendants *Connelly*, *Farley*, and *White*.

*T. R. Ferguson*, for the defendant *Shea*.

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June 22. DENTON, JUN. Co. C.J.:—The material facts in this case are not in dispute, though the inferences and conclusions to be drawn from these facts are matters of opinion. The questions involved are largely questions of law; and, if I have not arrived at the right decision, the fault does not lie with counsel, who have all given me the benefit of very full and able arguments. The facts, in so far as it is necessary to state them, are as follows:—

In 1916, a company was created and organised under the provisions of the Ontario Companies Act, under the name of the Canadian National Features Limited. The main objects of the company were, in short, to produce, buy, sell, or deal in motion pictures and motion picture films and to carry on a general theatrical business in Canada.

The company had an office in Toronto and a studio at Trenton, Ontario. The defendant Brownridge was appointed manager; and, the company having decided to produce motion picture plays and films, he proceeded to New York in December, 1916, to engage the actors and actresses. He engaged 23 in all, at wages or salaries varying in amount, one at \$1,250 a week, one at \$350 a week, and others at very much lower figures, their total weekly wages amounting to \$4,000.

He engaged the plaintiff, whose name at that time was Weston. This engagement is in writing, and provides that it is to be for one year at a weekly salary of \$75, for which sum she agreed to play the parts as casted and to be at the company's disposal at all times during the term of the contract. She also agreed to supply all modern wardrobe and to dress all parts assigned to her in a careful and painstaking manner.—The plaintiff has been on the stage since she was 9 years of age. She married in New York when she was 16, obtained a divorce when she was 19, and married, in May, 1917, her

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present husband, Ryan, who works for the Imperial Munitions Board at Trenton. She is not 29 years of age. In fulfilment of her engagement with the company, she came to Toronto and reported for duty and was sent to Trenton. It seems there were two or three companies (by which I mean companies of actors) there producing plays for the company. Each of these had a director of ceremonies, and it was the duty of the plaintiff to do what her director told her to do. She had no directing power herself, no one under her whom she had the right to control or direct. What she was required to do seems strange to those who do not live in or keep pace with the "movie" world. Sometimes she was required to ride a horse and be caught in the branches of a tree or fall from the horse into water. At other times she would appear in different situations with other women and men. It is manifest that the work she was called upon to do required intelligence, agility, vivacity, and personal attractiveness of no mean order. She commenced her duties on the 12th March, 1917, and continued therein till the 5th June, when she left because her salary had not been paid for 5 weeks and she saw little prospect of payment. She brought an action against the company for \$375, being 5 weeks' wages at \$75 a week, and obtained judgment on the 21st June, 1917, on which date execution was issued and placed in the hands of the Sheriff of Hastings, who made a return "*nulla bona*" on the 26th November, 1917. An order for the winding-up of the company was made on the 26th June, 1917, and the plaintiff filed her claim before the liquidator on the 10th December, 1917.

Not having been paid, she now brings this action, alleging that the defendants were directors of the company during the period for which her wages have not been paid, and as such are liable to her for those wages, under sec. 98 of the Ontario Companies Act, R.S.O. 1914, ch. 178. She claims that she is a "servant" within the meaning of this section.

All the defendants join in setting up two defences: first, that the plaintiff is not a servant within the meaning of the section; and, secondly, that the contract of employment was contrary to the Alien Labour Act, R.S.C. 1906, ch. 97, and was and is void and cannot be enforced by the plaintiff. The defendant Shea sets up the additional defence that he had ceased to be a director before the plaintiff's wages fell into arrears, if not before she began to

work for the company at all. The defendants Connelly, Farley, and White also set up an additional defence, viz., that they were not legally constituted directors, though they attended meetings and acted as such.

It is advisable to consider, first, the defence that the plaintiff is not a "servant" within the meaning of sec. 98, because if this defence prevails the others need not be considered. The original source of this legislation is to be found in ch. 40 of the Laws of New York State of the year 1848, when the first Act to authorise the formation of companies in that State was passed. The Act provided that "the stockholders of any company organised under the provisions of this Act, shall be jointly and severally individually liable for all debts that may be due and owing to all *labourers, servants and apprentices* for services performed for such corporation."

Our Legislature seems to have incorporated this provision into our Companies Act with the changes that the liability is placed upon the directors instead of the shareholders and the liability is limited to one year's wages. The phrase "labourers, servants and apprentices" has been considered in several cases before the Courts of New York State. These decisions, I think, should have weight with us, not as binding authorities, but as expressions of judicial opinion by the Judges of a State wherein the conditions under which people live and work so nearly correspond with our own. *Coffin v. Reynolds* (1868), 37 N.Y. 640, and *Balch v. New York and Oswego Midland R.R. Co.* (1871), 46 N.Y. 521, shew that from the beginning these Courts placed a restricted meaning upon the word "servant;" and later on, in 1882, *Wakefield v. Fargo* (1882), 90 N.Y. 213, a decision of the Court of Appeal, gave sanction and approval to this restriction. In this case the Court said (p. 218):—

"To the language of the Act must be applied the rule common in the construction of statutes, that when two or more words of analogous meaning are coupled together, they are understood to be used in their cognate sense, express the same relations, and give colour and expression to each other. Therefore, although the word 'servant' is general, it must be limited by the more specific ones, 'labourer and apprentice,' with which it is associated, and be held to comprehend only persons performing the same kind of

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service that is due from the others." And at p. 217: "It is plain, we think, that the services referred to are menial or manual services."

It was held in the *Wakefield* case that a bookkeeper and general manager at a yearly salary was not "*ejusdem generis*" with an apprentice or labourer.

A few years later, in 1890, probably as a result of this decision, the law of New York State was changed (see General Laws of New York of 1890, ch. 564) by substituting the word "employee" for the word "apprentice." The new statute came up for consideration in 1899 in *Bristor v. Smith*, 158 N.Y. 157. In that case it was held that an attorney of the company, who was paid a salary but who did not act exclusively for the company, was not an employee under the Act.

The last reported case in the New York Courts is *Farnum v. Harrison* (1915), 167 N.Y. App. Div. 704. In that case the plaintiff was a bookkeeper on a weekly wage of \$50, and a majority of the Court (three against two) decided in favour of the plaintiff. The decision is put upon the ground that "those who, being continuously employed in the corporate business for a compensation paid in wages, or in salaries, and being under the orders of the managers of the corporation, are usually regarded as its servants or employees."

It was not contended in the last two cases, as I read them, that the plaintiff would have been regarded as a servant if that word had been associated with labourers and apprentices only, but it was contended that the change in the statute had enlarged the class of persons entitled.

In our own Courts, *Welch v. Ellis* (1895), 22 A.R. 255, is the leading case, and the judgment in *Wakefield v. Fargo*, 90 N.Y. 213, and the reasons therefor, were adopted as a correct statement of the law. Even the passage in the *Wakefield* case (90 N.Y. at pp. 217, 218) in which the opinion is expressed that the statute applies only to a person "from whom the company does not expect credit, and to whom its future ability to pay is of no consequence . . . who does a day's work, or a stated job," is cited by Mr. Justice Osler with approval, in spite of the provision in our own statute which allows one years wages to be recovered. Mr. Justice Maclellan says (22 A.R. at p. 261) that "servants"

means "servants such as labourers and apprentices." Mr. Harding contends that the reasoning of the Judges in this case is *obiter* and in no way necessary for the decision of the case. I suppose that it could have been held that a foreman, who does no manual labour but pays and dismisses men, is not a servant, without at the same time stating that a servant must be in the same class as a labourer to come within the Act, but the opinion of these two able Judges as to the meaning of the Act ought not to be cast aside as having no weight.

The English authorities are not of so much assistance, as the language of the statutes is different. But it may be noted that under the Employers and Workmen Act, 1875, which defines "workman" as one who is a labourer, servant in husbandry . . . or otherwise engaged in manual labour," it has been held that a person who is employed as a practical working mechanic to develop ideas and inventions is not a servant within the meaning of the Act: *Jackson v. Hill* (1884), 13 Q.B.D. 618. Nor is a conductor of an omnibus—*Morgan v. London General Omnibus Co.* (1883), 12 Q.B.D. 201—though the contrary was held in Scotland in *Wilson v. Glasgow Tramways Co.* (1878), 5 Sess. Cas., 4th ser., 981. Nor is a grocer's assistant: *Bound v. Lawrence*, [1892] 1 Q.B. 226; nor the guard of a goods train: *Hunt v. Great Northern R.W. Co.*, [1891] 1 Q.B. 601; nor a hair-dresser: *Regina v. Justices of Louth*, [1900] 2 I.R. 714. But a man who had taken his degree in science, employed under a contract for 5 years' service, whose duties were partly in the laboratory but mostly in manual labour, was such a servant: *Bagnall v. Levinstein Limited*, [1907] 1 K.B. 531.

An English statute under which the decisions are more in point is the Wages Attachment Abolition Act, which provides that no attachment of the wages of any "servant, labourer, or workman" shall be made. Under this it has been held that a secretary of a company at a salary of £200 a year does not come within it: *Gordon v. Jennings* (1882), 9 Q.B.D. 45. In this case Grove, J., said: "I do not think his position and remuneration can be said to come within the same description as those of manual servants or labourers. His salary is more than sufficient to keep life up; his salary and employment is such as many persons in the positions of gentlemen are sometimes glad to get"—all of which shews, if it shews nothing more, that we are living in a different age and on another continent.

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Under the same statute it has been held that a clerk on a salary of £120 a year is not a servant, labourer, or workman: *Marks v. Booth* (1891), 90 L.T. Jour. 302.

A case much relied on by Mr. Harding, for the plaintiff, is *Re Winter German Opera Co.* (1907), 23 Times L.R. 662. This was a decision under the "Preferential Payments in Bankruptcy Act, 1888," which provides that in the distribution of assets "there shall be paid in priority to all other debts . . . all wages or salary of any clerk or servant in respect of services rendered to . . . the company," and it was held that an actor engaged to sing in an opera at a certain sum for each performance was a "servant" within the meaning of the Act. This case is said to be on all fours with the present. With much respect, I beg to differ. The actor is here grouped with a clerk, and a clerk is in *Marks v. Booth*, cited above, placed upon a higher level or status than that of a labourer or servant. And another circumstance that must be noticed is that, running through our Ontario Companies Act the word "employee" is frequently used (see secs. 34 and 36 as instances), whereas "servant" is used in sec. 98. A servant is always an employee, but I think an employee is not always a servant within this section.

My conclusion is that, having regard to the terms of the contract under which the plaintiff was engaged and the nature of the services she was called upon to render and the remuneration she was to receive, she is not "*ejusdem generis*" with "labourer" and "apprentice," and is therefore not a servant within the meaning of the Act, although she is, no doubt, included in the general legal definition of the word "servant."

It would have occasioned no regret on my part if I could have arrived at another conclusion, for she has earned her wages and is entitled to them; and, moreover, it is unlikely, if I am right in this judgment, that this company had any employees who were servants under this section, as they were all, or nearly all, actors or actresses.

Per J. In the view I have taken of the case, it is unnecessary to deal with the other defences raised. If an Appellate Division should come to a different conclusion on the branch of the case dealt with, and is called upon to deal with other features, the facts are spread upon the record, and the defendants offered no evidence to refute



them. These facts can therefore be found as readily by the appellate Judges as by the trial Judge.

The action will be dismissed. I hope the defendants will not ask for costs.

The plaintiff appealed from the judgment of the County Court.

October 17 and 18. The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

*R. T. Harding*, for the appellant. The decision of the learned trial Judge proceeded upon the ground that the plaintiff was not a servant within the meaning of sec. 98 of the Companies Act, and so not entitled to the benefit of the protection given by that section to the wages of "labourers, servants, and apprentices." In support of that view the case of *Welch v. Ellis*, 22 A.R. 255, was relied on. That case followed the American case of *Wakefield v. Fargo*, 90 N.Y. 213. It was based upon what may be called the doctrine of "*ejusdem generis*," which has frequently been overruled by recent decisions. [RIDDELL, J., suggested that "over-worked" was more nearly correct than "overruled."] In *Lee v. Friedman* (1909), 20 O.L.R. 49, almost the same defence was set up, but without avail. The English cases referred to by the trial Judge, which are cited in *Palmer's Company Precedents*, 11th ed., pp. 1020, 1021, were decided under statutes which are not in force, here. He referred to *Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767, 778; *Re Winter German Opera*, 23 Times L.R. 662. [RIDDELL, J., referred to *Re Morlock and Cline Limited* (1911), 23 O.L.R. 165.]

*M. H. Ludwig*, K.C., for certain of the defendants, respondents, argued that the learned trial Judge was right in following the *Welch* case, *supra*, and in applying the doctrine of *ejusdem generis*, which is still law. In *Lee v. Friedman*, *supra*, the point in question here did not come up, and the *Winter German Opera* case is also distinguishable on its facts. The plaintiff is by profession an actress, and is in no proper sense to be considered as a person getting her living by manual labour, as anything she does with her hands is merely incidental to her main business, and not essential to it. Reference was made to the following cases: *Jackson v. Hill*,

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13 Q.B.D. 618; *Bagnall v. Levinstein Limited*, [1907] 1 K.B. 531; *Gordon v. Jennings*, 9 Q.B.D. 45, *per* Grove, J., at p. 46; *Morgan v. London General Omnibus Co.* (1884), 13 Q.B.D. 832; *Cook v. North Metropolitan Tramways Co.* (1887), 18 Q.B.D. 683; *Hunt v. Great Northern R.W. Co.*, [1891] 1 Q.B. 601; *Bound v. Lawrence* [1892], 1 Q.B. 226; *Regina v. Justices of Louth*, [1900] 2 I.R. 714.

*F. E. O'Flynn*, *B. W. Essery*, *T. R. Ferguson*, and *Gideon Grant*, for several of the defendants, respondents.

*Harding*, in reply.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs, being of opinion that the case was not distinguishable from *Welch v. Ellis*, 22 A.R. 255, by which they were bound.

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Oct. 19.

[MEREDITH, C.J.C.P.]

RE HOMAN AND CITY OF TORONTO.

*Municipal Corporations—Gift of Money to "Catholic Army Huts"—Resolution of City Council—Ultra Vires—Resolution of Council of 1918—Money Payable in 1919—Statutory Powers of Council—"Aid to any Charitable Institution"—Municipal Act, sec. 398 (5)—"Charity."*

A resolution of the city council of 1918, authorising payment out of the municipal funds of a sum of money as a gift to a company incorporated, under the name of "Catholic Army Huts," for the purpose of erecting, equipping, and conducting huts for Canadian soldiers, to serve as chapels for (Roman) Catholic soldiers and recreation huts for all soldiers and to supply devotional aids for distribution to (Roman) Catholic soldiers, was quashed as *ultra vires* of the council, upon two grounds:—

- (1) That the council of 1918 had no power to require or authorise the raising of the money and payment of it in 1919.
- (2) That no municipal council had power to make such a gift: it was not authorised by sec. 398 (5) of the Municipal Act, R.S.O. 1914, ch. 192, nor by any other enactment of the Legislature; and there was no power to make such a gift unless conferred by statute.

Discussion of the meaning of the words "charitable" and "charity."

MOTION by Albert William Homan for an order quashing a resolution of the Municipal Council of the City of Toronto, authorising payment out of the municipal funds of a sum of \$15,000 to a company incorporated under the Canadian Companies Act, under the name of "Catholic Army Huts," for the purpose of erecting, equipping, and conducting "Catholic Army Huts for Canadian soldiers, which shall serve the twofold purpose of chapels

for Catholic soldiers and recreation huts for all soldiers, irrespective of creed, and to supply Catholic chaplains in the Canadian Overseas Forces and in the Canadian Militia with rosaries, medals, prayer-books, and similar devotional aids for distribution to Catholic soldiers.’’

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October 16. The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, Toronto.

*T. R. Ferguson*, for the applicant.

*Irving S. Fairty*, for the city corporation.

October 19. MEREDITH, C.J.C.P.:—Further consideration of the question involved in this matter has failed to enable me to discover any means by which the gift in question in it can be upheld; and also failed to enable the respondents to give any substantial answer to the objection to the gift suggested upon the argument of the case.

It must therefore be adjudged, for the reasons given during the argument, that the gift is invalid because it was not within the power of the municipal body, which made it, to make it.

It was so *ultra vires*, in the first place, because the council of the year 1918 had no power to require, or authorise, the raising of the money, and payment of it, in the year 1919; and according to the terms of the gift it could be ‘‘raised in the taxes of 1919,’’ and necessarily could be paid out of moneys so raised only.

For obvious reasons, the municipal council of each year is required, speaking generally, to live within its means—that is, is so required by law, whatever may happen in fact. It cannot, again speaking generally, create debts to be paid in future years without the assent of the ratepayers to the creation of such a debt. It cannot dispense the bounty the dispensing of which belongs to a future council.

That the gift is bad on this ground is hardly disputable; and hardly has been denied.

So too it seems to me to be invalid on the ground upon which the applicant attacked it; that is: that no municipal council has power to make such a gift.

The powers of municipal councils are circumscribed, territorially and otherwise. Unless power to make such a gift has



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been conferred by statute, there is no such power. There is no contention to the contrary; but it is said that such power is so conferred; that that part of the Municipal Act (R.S.O. 1914, ch. 192) which is in these words—"398. By-laws may be passed by the councils of all municipalities: . . . 5. For granting aid to any charitable institution or out-of-door relief to the resident poor"—confers it.

I cannot think that any one, even a lawyer familiar with the law of England respecting charities, could consider that these words cover the gift in question, the purpose of which is to enable those to whom the gift is made: "to erect, equip, and conduct Catholic Army Huts for Canadian soldiers, which shall serve the twofold purpose of chapels for Catholic soldiers and recreation huts for all soldiers, irrespective of creed, and to supply Catholic chaplains in the Canadian Overseas Forces and in the Canadian Militia with rosaries, medals, prayer-books, and similar devotional aids for distribution to Catholic soldiers."

Having regard to the local, and other circumscribed, powers of municipal councils, to the fact that the power is given alike to all such councils, great and small, and to the association of the latter words of the clause with the former without the intervention of even a comma, it seems to me that the popular meaning of the word "charity" in connection with pecuniary aid, is the meaning which the Legislature meant to convey and has conveyed by the words used; whether confined to charity within its territorial confines or not need not now be considered. Certain it is, in my mind, that the words used were not intended to cover and do not cover housing comforts and religious comforts or services to be given anywhere, without limit as to space or time.

And that the words are not wide enough to cover such a gift as this, subsequent legislation in the years 1915, 1916, 1917, and 1918,\* has made more abundantly plain. If Mr. Fairty is right in his contention, all this subsequent legislation is waste paper; and municipal councils have been asleep in regard to their widespread "charitable" power until this day.

Mr. Fairty relies also upon the Act of 1915: but there is nothing

\*See 5 Geo. V. ch. 37; 6 Geo. V. ch. 40; 7 Geo. V. ch. 41; 8 Geo. V. ch. 34—all Acts relating to Grants by Municipal Corporations for Patriotic Purposes.

in it that covers the purposes of the donors of this gift: he admits that there is nothing in the later enactments.

It is not needful to consider whether, even in the broad interpretation of the word "charity," as applied chiefly to bequests and devises, in the Courts of England, all the purposes of the donees should be considered charitable; and all must be, else the inseparable gift must fail.

The resolution must be quashed: if allowed to stand, it might be acted upon though invalid: and, as the respondents refused to rescind it after its invalidity was pointed out to them, the applicant must have his costs of this application if he asks for them.

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## [APPELLATE DIVISION.]

1918

Oct. 22.

A. J. REACH CO. V. CROSLAND.

*Way—Easement—Private Right of Way Appurtenant to Land—Extinction by Sale of Servient Tenement for Taxes—Method of Assessment—Confirmation by Statute—Sale and Conveyance Declared Valid.*

The judgment of MULOCK, C.J.Ex., *ante* 209, was affirmed; it being *held*, that, although the method of assessment adopted may have been wrong, yet the assessment having been confirmed and made binding by statute, and an Act having been passed declaring the tax sale and the conveyance made in pursuance of it to be valid, the defendants (the appellants) could not maintain their right to the easement.

AN appeal by the defendants from the judgment of MULOCK, C. J. Ex., *ante* 209.

October 22. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*J. H. Cooke*, for the appellants, argued that the learned trial Judge did not enter into the question of a prescriptive easement, such as the appellants claimed, and that such an easement is not assessable, and, therefore, not liable to be sold for taxes, citing *Chelsea Waterworks Co. v. Bowley* (1851), 17 Q. B. 358, which is referred to by Boyd, C., in *Essery v. Bell* (1909), 18 O.L.R. 76, at p. 79, where he expresses the opinion that it would be "an extraordinary state of the law" if the title to an easement could be extinguished in such a manner as is contended for in the present

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case. The cases referred to by the trial Judge, *Tomlinson v. Hill* (1855), 5 Gr. 231, *Soper v. City of Windsor* (1914), 32 O.L.R. 352, 22 D.L.R. 478, and *Re Hunt and Bell* (1915), 34 O.L.R. 256, 24 D.L.R. 590, are distinguishable from the case at bar, as they deal with interests of a different kind from that which is here in question. He referred to Black on Tax Titles, 2nd ed., sec. 104.

G. W. Morley, for the plaintiffs, the respondents, was not called upon.

At the conclusion of the argument for the appellants, the judgment of the Court was delivered (orally) by MEREDITH, C. J. O.:—Mr. Cooke has argued this case very fairly, and presented it from every aspect favourable to his client, but we do not see that there is any reason for disturbing the judgment that was pronounced by the Chief Justice of the Exchequer.

It may be that Mr. Cooke is right, and that the proper way to assess is to assess the dominant tenement for the added value given to it by the right to the easement which appertains to it, and that the owner of the soil over which the easement exists should be assessed for a sum less by what has been assessed in respect of the dominant tenement. Assuming that, the difficulty here is that that course has not been followed; the land itself has been assessed, that assessment has been confirmed, and there is a provision in the statute making it binding notwithstanding that no notice of the assessment has been given to the parties affected. Then, in addition to that, an Act has been passed declaring the sale and the conveyance made in pursuance of it to be valid.\* This is fatal to the appellants' case, and the appeal must be dismissed.

\*See the Ontario statutes 3 Edw. VII. ch. 86, sec. 8, and 7 Edw. VII. ch. 95, sec. 9, referred to in the judgment of MULLOCK, C.J. Ex., ante, at pp. 210, 211.



## [APPELLATE DIVISION.]

1918

Oct. 24.

## OTTAWA SEPARATE SCHOOL TRUSTEES V. QUEBEC BANK.

*Constitutional Law—Act respecting the Roman Catholic Separate Schools of the City of Ottawa, 7 Geo. V. ch. 60 (O.)—British North America Act, sec. 93—Expenditures of Commissioners in Carrying on Separate Schools—Recoupment.*

The Act of the Ontario Legislature passed on the 12th April, 1917, intituled "An Act respecting the Roman Catholic Separate Schools of the City of Ottawa," 7 Geo. V. ch. 60, does not violate the provisions of sec. 93 of the British North America Act.

Assuming that legislation which diverts from a Separate School, money which by law should be applied for carrying it on, would be invalid, legislation which validates expenditures properly made in carrying on a school or a number of schools by a *de facto* body not lawfully created cannot be said to affect any such right or privilege as sec. 93 deals with—still less prejudicially to affect it within the meaning of the section.

*Semble*, if a different conclusion had been reached as to the validity of the Act of 1917, the Commissioners appointed under the Act of 1915, 5 Geo. V. ch. 45, to manage the Ottawa Separate Schools, would still have been entitled to be recouped the moneys they had expended in carrying on the schools, and the result would be the same.

The effect of the decision of the Judicial Committee in *Ottawa Separate Schools Trustees v. Ottawa Corporation* and *Ottawa Separate Schools Trustees v. Quebec Bank*, [1917] A.C. 76, considered.

Judgment of CLUTE, J., 41 O.L.R. 594, reversed.

APPEALS by the Attorney-General for Ontario and the defendants and cross-appeal by the plaintiffs from the judgment of CLUTE, J., 41 O.L.R. 594.

October 7 and 8. The appeals and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

*McGregor Young*, K.C., for the Attorney-General for Ontario, referred to *Mackell v. Ottawa Separate School Trustees* (1915), 32 O.L.R. 245, 18 D.L.R. 456, affirmed, 34 O.L.R. 335, 24 D.L.R. 475, as shewing that the attitude of the trustees had been recalcitrant throughout and such as made it necessary for the Legislature to place the administration of the school funds in other hands. Provision was made for this state of affairs by the Act of 7 Geo. V. ch. 59 (O.), which had been declared by this Court to be *intra vires* of the Legislature of Ontario: *Re Ottawa Separate Schools* (1917), 41 O.L.R. 259, 40 D.L.R. 465. The Legislature had also passed the Act which is particularly in question in this case, 7 Geo. V. ch. 60, in order to afford proper relief and indemnity to the Com-

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missioners who had been appointed under the previous Act of 1915, in respect of moneys disbursed and liabilities incurred by them for the purpose of maintaining and carrying on the schools. The Act deals with a matter of civil rights in this Province, and does not in any way prejudicially affect any right or privilege of the supporters of denominational schools, within the meaning of sec. 93 of the British North America Act. It simply validates expenditures which were rendered necessary by the proved misconduct of the trustees. At the highest this is a mere question of money, and undoubtedly within the competence of the Legislature, so long as it appears that no right in respect of separate schools is prejudiced. These appellants acted in good faith in a time of crisis, and are entitled to the protection given them by the statute.

G. F. Henderson, K.C., for the Quebec Bank, submitted calculations of amounts under the judgment appealed against.

W. N. Tilley, K. C., for the Bank of Ottawa, the defendant Mackell, and other separate school supporters. The defendants are not seeking anything to which they have been declared not to be entitled by the judgment of the Privy Council declaring the Act of 1915 *ultra vires*. What that decision was directed to was the creation of a Commission which might be permanent, an objection which does not apply to the Act now in force, 7 Geo. V. ch. 59, which has been declared to be *intra vires* by this Court. What the Legislature can in advance authorise, it can retroactively validate. The contumacy of the trustees has continued during the whole time within which payments have been made by the Commission, so that legislative action has been justified throughout. He referred to *Mersey Docks Trustees v. Gibbs* (1866), 11 H.L.C. 686; *Reversion Fund and Insurance Co. Limited v. Maison Coswry Limited*, [1913] 1 K.B. 364, 373, 375, 377; *Pickering v. Thompson* (1911), 24 O.L.R. 378.

N. A. Belcourt, K.C., and J. H. Fraser, for the plaintiffs, argued that the relation between a bank and its customer is simply one of debtor and creditor, and does not partake of a fiduciary character: *Foley v. Hill* (1848), 2 H.L.C. 28. These cases should not have been tried together, and any question of the alleged trusts by which the moneys in the hands of the banks were affected does not affect their liability to the plaintiffs. The doctrine of subrogation on which the defendants rely applies

only to cases where there is privity, or a common obligation binding upon the parties, and does not apply to the present case. The judgment of the Privy Council as to the Act of 1915 is conclusive against the defendants: it is held that it is the creation of the powers of the Commission and not their mere exercise that is illegal. The whole matter comes under sec. 93 of the British North America Act, as the contention of the defendants interferes with the essential element in our rights that we should be entitled to administer our own property. Counsel referred to unauthorised acts by the Commissioners, such as increased payments to secretaries and teachers. They were in fact wrongdoers, or, to use the mildest term, volunteers, who had no right to recover the moneys expended by them. On the question of consolidation, reference was made to *Moser v. Marsden*, [1892] 1 Ch. 487; *Johnson v. Wild* (1890), 44 Ch. D. 146; and on the question of subrogation to *Ram Tuhul Singh v. Biseswar Lall Sahoo* (1875), L.R.2 Ind. App. 131, 143, and to *Ætna v. Life Insurance Co. v. Middleport* (1888), 124 U.S.R. 534, 547.

*Tilley*, in reply,

October 24. The judgment of the Court was read by MEREDITH, C.J.O.:—This case is an aftermath of the cases of *Ottawa Separate Schools Trustees v. Ottawa Corporation* and *Ottawa Separate Schools Trustees v. Quebec Bank*, [1917] A.C. 76, in which it was held by the Judicial Committee of the Privy Council that the Act of the Legislature of Ontario, 5 Geo. V. ch. 45, by which the management of the Ottawa Separate Schools was committed to a Commission appointed by the Crown, was, as framed, *ultra vires*, the ground of the decision being that the Act prejudicially affected the right or privilege conferred by the Act of the Parliament of the late Province of Canada of 1863 (26 Vict. ch. 5) upon the supporters of the Roman Catholic Separate Schools in Ottawa to elect trustees for the management of the schools.

In the first of these actions the relief claimed was an injunction restraining the Corporation of Ottawa from paying to the Commission or to any one except the School Board and restraining the Commission from receiving all moneys theretofore or thereafter levied, received, or collected for the support of the Ottawa Separate Schools, and in the other action the relief claimed was

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an injunction order restraining the Quebec Bank from delivering over to the Commission or to any one but the School Board and restraining the Commission from receiving certain moneys deposited by the School Board with the Quebec Bank.

These actions had been dismissed by the trial Judge (34 O.L.R. 624), and his judgments had been affirmed by this Court (36 O.L.R. 485). Appeals from these decisions were allowed by the Judicial Committee, and the declaration as to the validity of the Act I have mentioned was made.

On the 10th February, 1916, an order was made by the First Divisional Court for the payment into Court by the Corporation of the City of Ottawa of all rates, taxes, or other moneys collected or received or then in its hands for or for the purposes of the Separate Schools of the City of Ottawa or in question in the first mentioned action (*Ottawa Separate School Trustees v. Corporation of Ottawa*), and on the 3rd April, 1916, after the dismissal of the plaintiffs' appeal by the Divisional Court, an order was made by that Court for the payment out of Court to the Commission of the money that had been paid in under the order of the previous 10th February, as well as any other rates, taxes, or other moneys then in the hands of the Corporation of Ottawa for the purposes of the Separate Schools of Ottawa, and the order of the 10th February, as to payment into Court of any moneys thereafter coming to the hands of the corporation for those purposes, was vacated.

The money in Court was at once paid to the Commission pursuant to the order of the 3rd April.

These two orders stand unreversed, except in so far as the allowance of the appeals from the judgment in the action may have affected them.

Although the order of the 3rd April, 1916, appears in the record of proceedings for the Privy Council, and it was apparently the intention of the School Board to appeal from that order, as appears from the order of my brother Hodgins of the 22nd April, 1916 (37 O.L.R. 25), allowing the security on the appeal to the Privy Council, no reference is made to it in the order in council of the 6th November, 1916, allowing the appeals.

The order in council, however, provides for liberty being reserved to the appellants to apply to the Supreme Court for

relief in accordance with the declaration as to the invalidity of the Act. It is probable, I think, that this reservation was to enable the appellants to apply for relief in respect of the money that had been paid to the Commission under the order of the 3rd April, 1916.

In the reasons of my brother Hodgins for his order of the 22nd April, 1916, he says that if the appeal from the judgment in the action should be successful it would be followed by a direction for the return of the money or an account, if in fact it had been applied to the objects for which the appellants would be bound to expend it.

I shall refer to this aspect of the case further on, but I now proceed with the history of events.

The Commission took control of the schools on or about the 26th July, 1915, and handed it back to the School Board on the 1st November, 1916, after the decision of the Judicial Committee had been announced.

During the time the Commission was in control of the schools it received various sums which, but for its existence, would have been paid to the School Board, and the Commission expended in the conduct and management of the schools a large sum in excess of the sums so received. These additional moneys were provided by means of borrowings by the Commission, for which it remains liable to the lenders.

Shortly after the Commission passed out of existence, the School Board had the accounts of the expenditures made by the Commission audited, and the result of the audit was to shew that these accounts were satisfactory except as to a few small expenditures which the auditor thought to be open to question.

On the 12th April, 1917, an Act was passed by the Legislature of Ontario, intituled "An Act respecting the Roman Catholic Separate Schools of the City of Ottawa" (7 Geo. V. ch. 60). The preamble contains a recital of the Act authorising the appointment of the Commission and its appointment; that the Act had been declared *ultra vires*; that the trustees, prior to the appointment of the Commission, had neglected and failed to open, keep open, maintain and conduct the schools according to law and to provide qualified teachers for them; had threatened at various times to close the schools and had neglected and refused to discharge and

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perform the duties imposed upon them by law, to the loss and damage of the supporters of the schools and to the serious prejudice of the children entitled to attend them; that by reason of this default and neglect it was necessary to provide special means for the education of the children entitled to attend the schools until the trustees should be willing to perform their lawful duties in respect to them. and the Commissioners were appointed for that purpose; that the Commissioners entered into possession of the schools on the 26th July, 1915, and thereafter maintained and conducted them continuously until the Act was declared to be *ultra vires*, during the whole of which time the trustees were unwilling to conduct them according to law; that the Commissioners in carrying on the schools and meeting the obligations of the trustees disbursed \$68,873.43, which at the date of their appointment stood to the credit of the trustees in the Quebec Bank at Ottawa, the further sum of \$84,156.04 received out of Court pursuant to the order of the 3rd April, 1916, and the further sum of \$71,944.08 received from other sources, all of which sums were, by law, applicable to the maintenance and conduct of the schools; that the Commissioners also incurred, in the maintenance, conduct, and management of the schools, a liability to the Bank of Ottawa for \$71,891.16 and interest thereon, which still remains unpaid; and that the trustees had commenced actions against the Quebec Bank, the Bank of Ottawa, and the Commissioners, to recover the moneys so disbursed, and had refused to assume the said liability to the Bank of Ottawa; and that it was desirable to declare the rights of the parties.

The relevant provisions of the Act are as follows:—

“1. It is declared that the Commissioners disbursed the moneys and incurred the liability herein recited for payments and expenditures which were necessary to maintain and carry on the said schools and which should have been made by the Board in the proper conduct and management of the said schools but for its wrongful neglect and default as aforesaid.

“2. It is further declared that the said payments and expenditures shall be deemed for all purposes to have been made by the Commissioners for and on behalf and at the request of the Board and that the Commissioners are entitled to indemnity from the Board in respect thereof.



"3. It is further declared that the said liability of \$71,891.16 and interest thereon to the Bank of Ottawa, subject to the rights of third parties, if any, is a debt of the Board to the said bank and that the bank is entitled to set off the same against any other moneys of the Board in its hands.

"4. In default of payment of the said liability by the Board the same may be paid to the bank out of the Consolidated Revenue Fund of the Province and thereafter the said sum with proper interest thereon shall be a debt to His Majesty and may be recovered from the Board in any action brought for that purpose.

"5. This Act may be pleaded as a defence to any action now pending or that may hereafter be brought by the Board against any person or corporation in respect of any of the moneys received and disbursed by the Commission as aforesaid."

The actions referred to in the preamble are the actions the judgments in which are the subject of the present appeal, and the objects of them are correctly stated in the preamble.

The actions were tried before my brother Clute, and the judgment pronounced by him is dated the 14th January, 1918, and is one judgment in the three actions, which were consolidated by an order of my brother Middleton, dated the 19th March, 1917.

The questions raised are as to the right of the School Board to recover moneys standing at its credit in the Bank of Ottawa and the Quebec Bank which were paid over to the Commission and moneys received by the Commission from the Corporation of the City of Ottawa, being sums levied by the corporation for the support of separate schools, and the claim of the School Board is to recover from the banks the moneys at its credit with them and from the surviving members of the Commission and the executors of a deceased member (to whom I shall afterwards refer as "the Commission") the money received by it from the Corporation of Ottawa.

The defendants rely upon the statute 7 Geo. V. ch. 60 as a defence to the action, and claim that all these moneys were moneys expended by them in carrying on the schools, and that they ought therefore not to be required to repay them to the Board. The defendants the Bank of Ottawa counterclaim to recover from the School Board \$71,891.16 borrowed by the Commissioners from the Bank of Ottawa and used by the Commission in carrying on the schools.

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It should be mentioned that the sum claimed from the Commissioners is the sum paid into Court and afterwards paid out to the Commission under the order of the 3rd April, 1916, to which I have referred. All of the moneys which the School Board is seeking to recover were moneys which were applicable, and would, if they had come to its hands, have been applied, to the carrying on of the schools.

If the Act 7 Geo. V. ch. 60 is a valid enactment, the School Board's claims fail, and the counterclaiming defendants are entitled to succeed on their counterclaim. If it is not, the question is whether or not the defendants or any of them are liable for the repayment of school moneys which they received and expended in carrying on the schools, and whether or not the Commissioners are entitled to recover from the School Board the additional money expended by them for that purpose which they obtained by borrowing it from the Bank of Ottawa.

The contention of the School Board is that the members of the Commission are to be treated as wrongdoers and are not entitled to credit for the money they properly expended in carrying on the schools, and still less to be repaid the money which they borrowed and expended in that way.

The learned trial Judge held the Act of 7 Geo. V. ch. 60 to be *ultra vires*, but that, notwithstanding this, the Commissioners were entitled to credit against the sums they had received, the moneys they had properly expended in carrying on the schools, except a sum of \$37,626.02, which he held to be a trust fund applicable only to meet debentures, which had been issued at maturity, but that they were not entitled to recover on their counterclaim. If the view of the trial Judge as to that sum is correct, all that it would mean would be that if the fund is restored by the Commission the amount required for that purpose would be added to the sum claimed by the counterclaim, and if the Commission is entitled to recover on the counterclaim no object would be gained by requiring the Bank of Ottawa to make good the trust fund and at the same time requiring the School Board to pay to the Commission an equal amount.

Unless the legislation in question violates the provisions of sec. 93 of the British North America Act, it is clearly valid legislation, it being competent for the Legislature to have enacted it

under the powers conferred by sec. 92 of that Act (paras. 13, 14, and 16).

In my view, the legislation does not violate the provisions of sec. 93. Assuming that legislation which diverts from a Separate School, money which by law should be applied for carrying it on, would be invalid, I am unable to see how legislation which validates expenditures properly made in carrying on a school or a number of schools by a *de facto* body not lawfully created can be said to affect any such right or privilege as the section deals with, still less prejudicially to affect it within the meaning of the section.

The situation as disclosed on the evidence was that the School Board was conducting the schools under its charge in contravention and defiance of the law, and had brought about such a state of things, that the Legislature, in order to secure for the children of the supporters of separate schools in Ottawa the education to which they were by law entitled, found it necessary to intervene and to place the schools under the control and management of a Commission; the Commissioners appointed entered upon their duties and in good faith carried on the schools and expended the moneys in question in carrying them on; and what is argued is that, because the Commission, as it has been held, had no legal existence, the supporters of the schools are entitled, though they have enjoyed the benefit of that expenditure, to say that it was improperly made and that the Commissioners must pay the money out of their pockets, with the result that the schools will have been carried on while the Commission was in charge of them, free of expense to the supporters of the schools, and that the Commissioners must pay over to the School Board what will probably suffice to carry them on for a further period of a year or more.

It cannot, I think, be that the Legislature is powerless to prevent such a wrong from being perpetrated. While the School Board is a separate entity, it is a trustee for the supporters of the separate schools, and what is argued is that these supporters who have enjoyed the benefit of having their schools carried on are entitled to say to the Commissioners, "You have carried them on without authority and must lose all that you have expended in so doing." The Commission was the *de facto* trustee for the time being of the separate school supporters, and in all justice is entitled to be recouped the expenditure it has made for the benefit of its *cestuis que trust*.

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In my judgment, the case does not differ from that of an incorporated company whose affairs were managed by a board of directors not validly chosen, and in such a case I am aware of no principle of law which would prevent the *de facto* board from successfully claiming to be allowed against what had come to its hands of the company's money, the expenditures which it had properly made in carrying on the company's business and to be indemnified against any liability it had incurred in so doing.

If this be the correct view, why are the Commissioners to be held to be in a worse position than the *de facto* directors in the case I have suggested? I know of no reason.

If then this be the measure of the Commissioners' right, how can it be said that legislation which declares that right prejudicially affects any right or privilege of the supporters of the Ottawa Separate Schools?

True it is that if the legislation is effective the School Board is deprived of the right to have the accounts taken; but nothing substantial has been taken away in view of the result of the audit which the School Board had made, which, as I have said, shewed that the accounts were substantially correct and that only a few small items were open to question, and that as to these or indeed as to any item that was questioned by the School Board, the evidence at the trial made it clear that the accounts were correct.

If effect were given to the contention of the School Board, it would follow that if it had borrowed money for a legitimate purpose and had applied it to that purpose, but in consequence of the absence of some statutory formality the lender could not enforce his claim in the Courts, it would not be competent for the Legislature to enact that, notwithstanding the informality, the debt should be recoverable. Legislation of that character is not often passed by the Imperial Parliament, but in a new country like Canada it is sometimes necessary that it should be and it is passed.

I would for these reasons allow the appeals of the defendants with costs, reverse the judgment of the learned trial Judge, and substitute for it judgment dismissing the actions with costs and directing that judgment be entered for the Bank of Ottawa on their counterclaim with costs, and I would dismiss the appeal of the School Board with costs.

If I had reached a different conclusion as to the validity of the Act, I should nevertheless, for the reasons I have given, have been of opinion that the Commissioners are entitled to be recouped the money they have expended in carrying on the schools, and the result would be the same.

*Defendants' appeal allowed; plaintiffs' appeal dismissed.*

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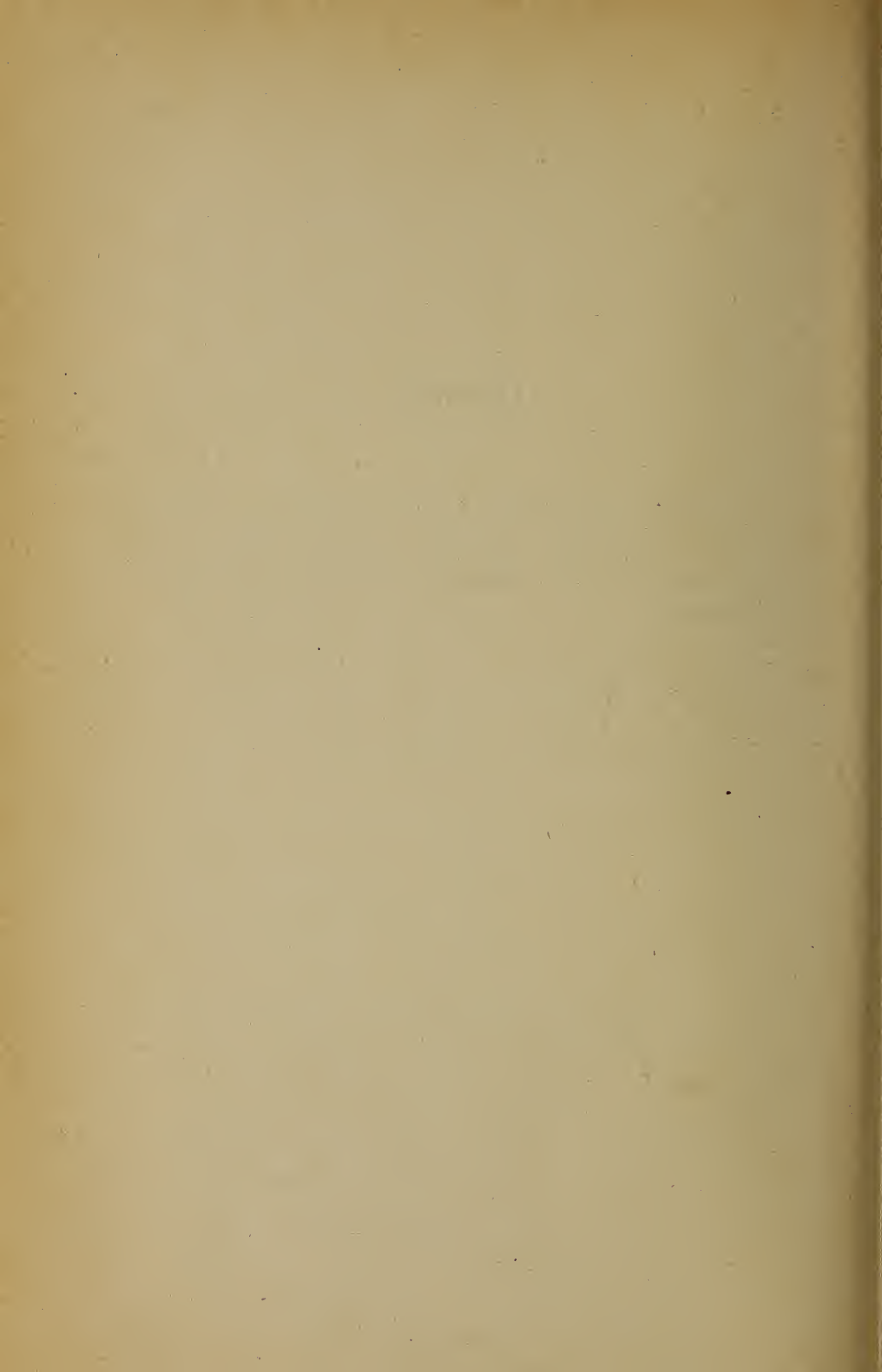




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in Chambers, whereby two British companies were added as defendants in this action and permission was given to serve process upon them out of the jurisdiction, was dismissed, upon the ground that the order appealed from did not “finally dispose of the whole or any part of the action,” and leave to appeal had not been obtained: Rule 507 (2). *Boston Law Book Co. v. Canada Law Book Co. Limited*, 233.

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ASSTS. & PREFS.—(*Continued.*) fully defend an action for the recovery of the price they agreed to pay. When the plaintiff proved that the goods were sold and delivered, and that the purchasers were solvent, he established a *prima facie* case; and the defendants were not entitled to say that they could make no profit because no recovery of the purchase-price was possible; the purchasers could not set up a defect in the title of their vendor.—The defendants had brought an action against the purchasers upon their promissory notes, and that action had been dismissed, but the dismissal was by the consent of the defendants, the plaintiffs in that action; the dismissal established nothing in favour of the defendants unless they shewed, which they did not, that some secret arrangement for payment had not been made when they consented to the dismissal.—And, therefore, the Master had rightly found that the defendants had made a profit of \$1,739.25. *Wade v. James*, 614.

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*Canadian General Securities Co. Limited v. George* (1918), 42 O.L.R. 560, specially referred to.]—See COMPANY, 3.

*Canadian Pacific R.W.Co. v. Western Union Telegraph Co.* (1889), 17 Can. S.C.R. 151, specially referred to.]—See COMPANY, 3.

*Chanter v. Hopkins* (1838), 4 M. & W. 399, followed.]—See SALE OF GOODS, 1.

## CASES—(Continued.)

*Comfort v. Brown* (1878), 10 Ch. D. 146, applied.]—See WILL, 1.

*Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 299, followed.]—See NEGLIGENCE, 1.

*Corham v. Kingston* (1889), 17 O.R. 432, followed.]—See VENDOR AND PURCHASER, 2.

*Crawford v. Tilden* (1907), 14 O.L.R. 572, followed.]—See CONSTITUTIONAL LAW, 2.

*Davis v. Township of Usborne* (1916), 36 O.L.R. 148, dictum at p. 151 explained.]—See HIGHWAY, 2.

*De Beauvoir v. De Beauvoir* (1852), 3 H.L.C. 524, applied.]—See WILL.

*Degg v. Midland R.W. Co.* (1887), 1 H. & N. 773, distinguished.]—See MUNICIPAL CORPORATIONS, 4.

*Delong v. Mumford* (1878), 25 Gr. 586, followed.]—See WILL, 5.

*Edmonds v. Hamilton Provident and Loan Society* (1881), 18 A.R. 347, followed.]—See VENDOR AND PURCHASER, 2.

*Edwards v. Blackmore* (1918), 42 O.L.R. 105, referred to.]—See CONTRACT, 3.

*Farmers' Loan and Savings Co., Re* (1904), 3 O.W.R. 837, referred to.]—See TRUSTS AND TRUSTEES.

*Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A.C. 592, applied and followed.]—See INSURANCE, 1.

*Fleming, Re* (1886), 11 P.R. 272, 278, 426, followed.]—See TRUSTS AND TRUSTEES.

*Florence Mining Co. Limited v.*



## CASES—(Continued.)

*Cobalt Lake Mining Co. Limited* (1909), 18 O.L.R. 275, affirmed.]

—See MINES AND MINERALS.

*Forget v. Baxter*, [1900] A.C. 467, 479, followed.]—See CONTRACT, 1.

*Gould v. Ferguson* (1913), 29 O.L.R. 161, followed.]—See SOLICITOR.

*Grainger v. Hill* (1838), 4 Bing. N.C. 212, followed.]—See DURESS.

*Grand Trunk R.W. Co. v. Hainer* (1905), 36 Can. S.C.R. 180, referred to.]—See NEGLIGENCE, 2.

*Grand Trunk R.W.Co. v. Mc-Alpine*, [1913] A.C. 838, referred to.]—See NEGLIGENCE, 2.

*Hamilton v. City of Fond du Lac* (1870), 25 Wis. 496, followed.]—See ONTARIO TEMPERANCE ACT, 2.

*Hayward v. Drury Lane Theatre Limited*, [1917] 2 K.B. 899, 906, referred to.]—See MUNICIPAL CORPORATIONS, 4.

*Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30, specially referred to.]—See COMPANY, 3—Followed.]—See SALE OF GOODS, 1.

*Helwig v. Siemon* (1916), 10 O.W.N. 296, followed.]—See CONTRACT, 3.

*Hill v. Hill* (1904), 8 O.L.R. 710, referred to.]—See CONTRACT, 4.

*Howe Machine Co. v. Walker* (1874), 35 U.C.R. 37, specially referred to.]—See COMPANY, 3.

*Hughes, Re* (1918), 42 O.L.R. 345, referred to.]—See TRUSTS AND TRUSTEES.

*Huguenin v. Baseley* (1807),

## CASES—(Continued.)

14 Ves. 273, 291, 292, followed.]—See CONTRACT, 7.

*Hunt and Bell, Re* (1915), 34 O.L.R. 256, applied and followed.]—See WAY, 1.

*Johnson v. Raylton* (1881), 7 Q.B.D. 438, followed.]—See SALE OF GOODS, 2.

*Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, 182, referred to.]—See HUSBAND AND WIFE.

*Junor v. International Hotel Co. Limited* (1914), 32 O.L.R. 399, 408, 409, specially referred to.]—See MASTER AND SERVANT, 2.

*Kavanagh v. Barber* (1891), 12 N.Y. Supp. 603, followed.]—See ONTARIO TEMPERANCE ACT, 2.

*Kendler v. Bernstock* (1915), 33 O.L.R. 351, applied.]—See CONSTITUTIONAL LAW, 2.

*Leduc v. Ward* (1888), 20 Q.B. D. 475, 479, applied and followed.]—See RAILWAY, 1.

*Lennard's Carrying Co. Limited v. Asiatic Petroleum Co. Limited*, [1915] A.C. 705, applied.]—See SHIP.

*McBrady and O'Connor, Re* (1899), 19 P.R. 37, 43, followed.]—See SOLICITOR.

*McIntyre, Re, McIntyre v. London and Western Trusts Co.* (1904), 7 O.L.R. 548, referred to.]—See TRUSTS AND TRUSTEES.

*Mackay v. City of Toronto* (1917), 39 O.L.R. 34, affirmed.]—See MUNICIPAL CORPORATIONS, 1.

*Magill v. Township of Moore* (1917), 41 O.L.R. 375, reversed.]—See NEGLIGENCE, 4.

*Mahoney v. City of Guelph* (1917), 41 O.L.R. 308, reversed.]

## CASES—(Continued.)

—See MUNICIPAL CORPORATIONS, 4.

*Metropolitan Water Board v. Dick Kerr and Co. Limited*, [1918] A.C. 119, affirmed.]—See CONTRACT, 8.

*Monkman and Canadian Order of Chosen Friends, Re* (1918), 42 O.L.R. 363, followed.]—See INSURANCE, 3.

*Monti v. Barnes*, [1901] 1 Q.B. 205, followed.]—See MORTGAGE, 2.

*Moore v. Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462, 465, referred to.]—See RAILWAY, 2.

*Morris v. Barron & Co.*, [1918] A.C. 1, followed.]—See CONTRACT 3.

*Murphy v. City of Toronto* (1918), 41 O.L.R. 156, affirmed.]—See WORKMEN'S COMPENSATION ACT.

*Murphy v. Lamphier* (1914), 31 O.L.R. 287, 319, specially referred to.]—See WILL, 5.

*Newberry v. Bristol Tramways and Carriage Co. Limited* (1912), 107 L.T.R. 801, specially referred to.]—See NEGLIGENCE, 3.

*Oesterreichische Export A.G. v. British Indemnity Insurance Co. Limited*, [1914] 2 K. B. 747, distinguished.]—See PARTIES.

*Ottawa Separate School Trustees v. Quebec Bank* (1918), 41 O.L.R. 594, reversed.]—See CONSTITUTIONAL LAW, 1.

*Ottawa Separate Schools Trustees v. Ottawa Corporation*, [1917] A.C. 76, considered.]—See CONSTITUTIONAL LAW, 1.

*Park v. Lawton*, [1911] 1 K.B. 588, applied and followed.]—See FINES AND PENALTIES.

## CASES—(Continued.)

*Pim v. Municipal Council of Ontario* (1855), 9 U.C.C.P. 304, distinguished.]—See MUNICIPAL CORPORATIONS, 1.

*Potter v. Faulkner* (1861), 1 B. & S. 800, distinguished.]—See MUNICIPAL CORPORATIONS, 4.

*Queensland Investment and Land Co. Limited v. O'Connell and Palmer* (1896), 12 Times L.R. 502, followed.]—See CONTRACT, 1.

*Ramsay v. Toronto R.W. Co.* (1913), 30 O.L.R. 127, referred to.]—See NEGLIGENCE, 2.

*Reach (A.J.) Co. v. Crosland* (1918), 43 O.L.R. 209, affirmed.]—See WAY, 1.

*Rex v. Broad*, [1915] A.C. 1110 referred to.]—See NEGLIGENCE, 2.

*Rex v. Irish* (1909), 18 O.L.R. 351, followed.]—See ONTARIO TEMPERANCE ACT, 2.

*Rex v. Thompson*, [1914] 2 K.B. 99, referred to.]—See CRIMINAL LAW.

*Roberts v. Charing Cross Euston and Hampstead R.W. Co.* (1903), 87 L.T.R. 732, 733, 734, referred to.]—See RAILWAY, 2.

*Rowe v. Grand Trunk R.W. Co.* (1866), 16 U.C.C.P. 500, 506, followed.]—See CONTRACT, 7.

*Roxburghe v. Cox* (1881), 17 Ch. D. 520, 526, distinguished.]—See CHOSE IN ACTION.

*Royal Bank of Canada v. The King*, [1913] A.C. 283, 298, specially referred to.]—See COMPANY, 3.

*Rubel Bronze and Metal Co. Limited and Vos, In re*, [1918] 1 K.B. 315, applied.]—See CONTRACT, 8.

CASES—(Continued.)

*Russell v. Wakefield Waterworks Co.* (1875), L.R. 20 Eq. 474, 481, followed.]—See COMPANY, 1.

*Seagram v. Pneuma Tubes Limited* (1917), 40 O.L.R. 301, varied.]—See FINES AND PENALTIES.

*Smith & Co. v. Bedouin Steam Navigation Co. Limited*, [1896] A.C. 70, applied and followed.]—See RAILWAY, 1.

*Solicitor, Re* (1917), 12 O.W.N. 191, followed.]—See SOLICITOR.

*Soper v. City of Windsor* (1914), 32 O.L.R. 352, applied and followed.]—See WAY, 1.

*Southby v. Southby* (1917), 40 O.L.R. 429, 432, followed.]—See CONTRACT, 4.

*Southport and West Lancashire Banking Co. v. Thompson* (1887), 37 Ch. D. 64, 70, followed.]—See MORTGAGE, 2.

*Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works*, [1898] 2 Ch. 603, 611, referred to.]—See RAILWAY, 2.

*Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335, followed.]—See MORTGAGE, 2.

*Stein v. Valkenhuysen* (1858), E. B. & E. 65, followed.]—See DURESS.

*Stevens v. Theatres Limited*, [1903] 1 Ch. 857, distinguished.]—See MORTGAGE, 1.

*Stoddart v. Union Trust Limited*, [1912] 1 K.B. 181, distinguished.]—See CHOSE IN ACTION.

*Tomlinson v. Hill* (1855), 5 Gr. 231, applied and followed.]—See WAY, 1.

*Toronto General Trusts Corporation and Central Ontario R.W.*

CASES—(Continued.)

*Co.* (1905), 6 O.W.R. 350, followed.]—See TRUSTS AND TRUSTEES.

*Townsend's Auto Livery v. Thornton* (1917), 13 O.W.N. 237, followed.]—See STREET RAILWAY.

*Tyrrell v. Painton*, [1894] P. 151, 157, 158, followed.]—See WILL, 2, 5.

*Valpy v. Gibson* (1847), 4 C. B. 837, followed.]—See CONTRACT, 5.

*Vanzant v. Coates* (1917), 39 O.L.R. 557, 40 O.L.R. 556, followed.]—See CONTRACT, 7—WILL, 5.

*Virginia Caroline Chemical Co. v. Norfolk and North American Steam Shipping Co.*, [1912] 1 K.B. 229, 243, 244, applied.]—See SHIP.

*Walker v. Boughner* (1889), 18 O.R. 448, approved.]—See CONTRACT, 10.

*Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394, followed.]—See SALE OF GOODS, 1.

*Waterous Engine Works Co. v. Town of Palmerston* (1892), 21 S.C.R. 556, followed.]—See MUNICIPAL CORPORATIONS, 1.

*Webb v. Barton Stoney Creek Consolidated Road Co.* (1895), 26 O.R. 343, referred to.]—See HIGHWAY, 1.

*Welch v. Ellis* (1895), 22 A.R. 255, followed.]—See COMPANY, 2.

*Wilson and Toronto General Trusts Corporation, In re* (1908), 15 O.L.R. 596, followed.]—See EXECUTORS AND ADMINISTRATORS.

*Wood v. Adams* (1905), 10 O.L.R. 63, 637, 638, referred to.]—See HUSBAND AND WIFE.



**CASES—(Continued.)**

*Wright v. Carter*, [1903] 1 Ch. 27, 50, 54, 55, followed.]—*See* CONTRACT, 7.

**CATHOLIC ARMY HUTS.**

*See* MUNICIPAL CORPORATIONS, 2.

**CHANGE OF BENEFICIARY.**

*See* INSURANCE, 3.

**CHARITY.**

*See* MUNICIPAL CORPORATIONS, 2.

**CHEQUE.**

*See* COMPANY, 1—CONTRACT, 9—DURESS.—

**CHOSE IN ACTION.**

*Assignment of—Agreement for Purchase of Interest in Land—Action by Assignee—Defences—Covenant to Pay—Condition Precedent—Fraudulent Misrepresentation by Assignor as to Price—Equity of Covenantor to Rescind—Assignment Subject to Equity—Failure of Action by Assignee—Costs.*]—The defendant gave M. \$1,000 to invest as he (M.) pleased; the defendant said he would put in no more money. M. then said he had bought a parcel of land for \$16,000 and had put the \$1,000 into it; he proposed that the defendant should pay \$2,200 more, in instalments, and take a one-fifth interest in the parcel; he sent the defendant for his signature a written agreement to pay the \$2,200. The defendant, after investigation, signed the agreement:—*Held*, that the defendant could not be

**CHOSE IN ACTN.—(Continued.)**

heard to say that he did not promise to pay as he covenanted—that the \$1,000 was paid as a condition precedent to an understanding that he was not to comply with his covenant.—M. said that the parcel cost \$16,000, so that the defendant was obtaining his one-fifth at cost. The price was in fact \$15,000, as M. knew:—*Held*, that the misrepresentation made was material, and gave the defendant an equity to rescind the contract; the plaintiffs, to whom M. had conveyed the land and assigned the defendant's agreement, took subject to this equity; and their action for the \$2,200 failed.—There was nothing to prevent the assignor, M., from disclosing his fraud or to preclude the defendant from relying upon it.—*Stoddart v. Union Trust Limited*, [1912] 1 K.B. 181, and *Roxburghe v. Cox* (1881), 17 Ch. D. 520, 526, distinguished.—The action was dismissed without costs. *London and Western Canada Investment Co. v. Dolph*, 449.

**CHURCH.**

*See* CONTRACT, 6—MUNICIPAL CORPORATIONS, 2.

**COLLISION.**

*See* NEGLIGENCE, 2.

**COMITY.**

*See* COMPANY, 3.

**COMMISSIONERS OF PUBLIC WORKS.**

*See* MUNICIPAL CORPORATIONS, 4.

## COMMON EMPLOYMENT.

See MUNICIPAL CORPORATIONS, 4.

## COMPANY.

1. *Action by Shareholder for Declaration that Agreement between Company and another Shareholder Illegal—Style of Cause not Shewing that Plaintiff Suing on Behalf of other Shareholders—Amendment—Improvidence—Fraud—Consideration—Election of Directors—Loan by Company to Shareholder—Ultra Vires—Companies Act, R.S.C. 1906, ch. 79, sec. 29, sub-sec. 2—Status of Shareholder—Payment for Shares—Acceptance of Cheque—Evidence—Share-register—Partnership not Separate Entity—Deposit of Money—“Loan”—Relief—Injunction—Repayment to Company of Money Lent.*—The plaintiff, a shareholder in an incorporated company, sued W. S., W. S. & Son, and the company for a declaration that a certain agreement, dated the 24th August, 1910, and a loan of money made by the company to W. S. & Son, were illegal, and for repayment of the money to the company:—*Held*, that the plaintiff must be taken to be suing alone, inasmuch as she had not in the style of cause proclaimed herself as suing on her own behalf and on behalf of all other shareholders of the company; but that she should be permitted to amend so as to claim in a representative capacity.—(2) That 510 shares of the stock of the company allotted to W. S. had been paid-up in full, the company having legally

## COMPANY—(Continued.)

accepted a cheque in payment; and, even if the shares were not paid-up, the plaintiff could not maintain an action for recovery of a balance due from a shareholder to the company in respect of his shares—the company would be the only proper plaintiff.—*Burland v. Earle*, [1902] A. C. 83, *Bennett v. Havelock Electric Light Co.* (1911), 25 O.L.R. 200, and *Allen v. Hyatt* (1914), 17 D.L.R. 7 (P.C.), followed.—(3) That the plaintiff could not attack the agreement on the ground that the company was not bound by it because it was improvident; such an agreement can be attacked by a shareholder only if the agreement is fraudulent and constitutes a fraud upon him.—(4) That, upon the evidence, there was consideration to the company for the agreement.—(5) That a board of directors of the company was properly elected on the 24th August, 1910, and that there continued to be a proper board to carry on the affairs of the company from that time on.—(6) That the agreement was *ultra vires* by reason of the fact that it was for a loan from the company to one of its shareholders of money belonging to the company, in contravention of sec. 29, sub-sec. 2, of the Canadian Companies Act, R.S.C. 1906, ch. 79.—The 510 shares were the property of W. S.; the share-register shewed that, and it must govern, unless definitely proved to be incorrect or false, which was not the case; and, even if

**COMPANY—(Continued.)**

the shares were the property of the firm of W. S. & Son, of which W. S. was a member, the firm was not a separate entity; and, when the loan was made to W. S. & Son, it was made to W. S. and his partners.—The depositing of the money with W. S. & Son constituted a lending to them, upon the principle, well-established in the case of banks, that a deposit of money makes the depositor not a bailee but a debtor.—(7) That the plaintiff was entitled to maintain the action to prevent the company from doing something *ultra vires*; and, as a necessary incident, the Court should direct the repayment of the money lent.—*Russell v. Wakefield Waterworks Co.* (1875), L.R. 20 Eq. 474, 481, followed. *Henderson v. Strang*, 617.

2. *Directors—Personal Liability for Wages of “Labourers, Servants and Apprentices”*—*Companies Act, R.S.O. 1914, ch. 178, sec. 98 (1)*—“*Servant*”—*Actress Employed by Theatrical Company.*—An actress engaged by a theatrical company (incorporated under the Ontario Companies Act, R.S.O. 1914, ch. 78), at a weekly salary, under a written contract, to play such parts as might be assigned to her, is not a “servant” of the company within the meaning of sec. 98 (1) of the Act, which provides that “the directors of the company shall be liable to the labourers, servants and apprentices thereof for all debts not exceeding one year’s wages due for services

**COMPANY—(Continued.)**

performed by the company while they are such directors respectively.”—*Welch v. Ellis* (1895), 22 A.R. 255, followed. *Ryan v. Wills*, 624.

3. *Incorporation of Saskatchewan Company by Memorandum of Association under Saskatchewan Companies Act—Doing Business in Ontario—Sale in Ontario of Saskatchewan Land to Citizen of Ontario—General Right of Foreign Incorporated Company to Carry on Business outside of Country of Incorporation—Comity—Limitation of Right—Lack of Plenary Sovereign Authority in Incorporating Province—Limited Power Exercisable by Province—Contract Made in Ontario beyond Powers of Company—Effect of Ontario License Granted Six Years after Contract—Extra Provincial Corporations Act, R.S.O. 1914, ch. 179, secs. 6, 7 (1), 12, 16—Limitation of sec. 16 to Companies Created by Sovereign Authority Possessing Plenary Powers—Royal Prerogative not Exercised in Creation of Company—License Ineffective—Saskatchewan Act Passed in 1917 Amending Companies Act and Purporting to Empower Company to Accept Extra Provincial Powers—Ultra Vires as regards Effect upon Action in Ontario—Defence to Action by Company for Specific Performance—Misrepresentation—Failure to Prove—Collateral Independent Warranty as to Resale—Absence of Intention—Amendment—Condition Subsequent—Oral Evidence—Statute of Frauds.]—An action*



**COMPANY—(Continued.)**

by a company incorporated in Saskatchewan to enforce specific performance of an agreement made by the defendant in Ontario, where he resided, for the purchase of land in Saskatchewan. The defendant pleaded *ultra vires* and misrepresentations, and succeeded upon the former defence—not on the latter. Many questions were raised and decided by the judgment in the action, which are fully summarised in the head-note and are indicated by the above head-lines.—The cases specially referred to were, upon the capacity and powers of the company: *Howe Machine Co. v. Walker* (1874), 35 U.C. R. 37; *Canadian Pacific R.W. Co. v. Western Union Telegraph Co.* (1889), 17 Can. S.C.R. 151; *Bonanza Creek Gold Mining Co. The King*, [1916] 1 A.C. 566, 584; *Royal Bank of Canada v. The King*, [1913] A.C. 283, 298; and upon the question of misrepresentations: *Canadian General Securities Co. Limited v. George* (1918), 42 O.L.R. 560, and *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30. *Weyburn Townsite Co. Limited v. Honsburger*, 451.

4. *Insolvency of Trust Company Incorporated by Dominion Authority—Winding-up—Company Licensed to Do Business in Ontario—Loan and Trust Corporations Act—Application to Dominion Company—Powers of Provincial Legislature—Question not Open in Action on Bond—Election of Trust Company to Give Bond as*

**COMPANY—(Continued.)**

*Term of Receiving License—Liability of Sureties—Extent of—Damages—Lien—Subrogation.]—* A trust company incorporated by Dominion authority applied under the Loan and Trust Corporations Act of Ontario, R.S.O. 1914, ch. 184, for registry in Ontario, and, as a term of receiving a license to do business, was required to furnish a bond for the due performance of the duties of any office to which it might be appointed under the terms of its charter and the license granted. The trust company procured the defendants to give a bond, in favour of the Attorney-General for Ontario, in trust for all persons who should become creditors of the trust company by reason of any business done in Ontario. The trust company was appointed executor of a will, and undertook the administration of the testator's estate in Ontario; in dealing with that estate, it paid capital money to two beneficiaries who were entitled to income only. The trust company became insolvent and was ordered to be wound up. The liquidator obtained from the Court an order relieving the company from the executorship and for the passing of the accounts. Upon a reference, the trust company was found liable for the amounts improperly advanced, and was declared entitled to a lien upon the accruing income of the beneficiaries. This action having been brought upon the bond:—*Held*, that neither the trust company nor its sureties

**COMPANY—(Continued.)**

could question the constitutional validity of the Act under which the bond was demanded and given.—Judgment of LATCHFORD, J., 41 O.L.R. 234, upon this branch of the case, affirmed.—*Held*, also, that the sureties were not liable for any greater sum than the principal debtor; and the amount of damages assessed by LATCHFORD, J., was reduced to the amount for which the trust company was liable in respect of the advances made to the beneficiaries—the sureties, defendants, becoming subrogated to the lien upon the accruing income. *Attorney-General for Ontario v. Railway Passengers Assurance Co.*, 108.

See CONTRACT, 1, 3—COSTS, 2  
—FINES AND PENALTIES.

**COMPENSATION.**

See MUNICIPAL CORPORATIONS,  
3 — TRUSTS AND TRUSTEES —  
VENDOR AND PURCHASER, 1.

**CONDITION PRECEDENT.**

See CHOSE IN ACTION.

**CONFIDENTIAL RELATIONSHIP.**

See CONTRACT, 7.

**CONSENT JUDGMENT.**

See ASSIGNMENTS AND PREFERENCES.

**CONSIDERATION.**

See HUSBAND AND WIFE.

**CONSPIRACY.**

See WILL, 3.

**CONSTITUTIONAL LAW.**

1. *Act respecting the Roman Catholic Separate Schools of the City of Ottawa*, 7 Geo. V. ch. 60 (O.)—*British North America Act*, sec. 93—*Expenditures of Commissioners in Carrying on Separate Schools—Recoupment.*—The Act of the Ontario Legislature passed on the 12th April, 1917, intituled "An Act respecting the Roman Catholic Separate Schools of the City of Ottawa," 7 Geo. V. ch. 60, does not violate the provisions of sec. 93 of the British North America Act.—Assuming that legislation which diverts from a Separate School, money which by law should be applied for carrying it on, would be invalid, legislation which validates expenditures properly made in carrying on a school or a number of schools by a *de facto* body not lawfully created cannot be said to affect any such right or privilege as sec. 93 deals with—still less prejudicially to affect it within the meaning of the section.—*Semble*, if a different conclusion had been reached as to the validity of the Act of 1917, the Commissioners appointed under the Act of 1915, 5 Geo. V. ch. 45, to manage the Ottawa Separate Schools, would still have been entitled to be recouped the moneys they had expended in carrying on the schools, and the result would be the same.—The effect of the decision of the Judicial Committee in *Ottawa Separate Schools Trustees v. Ottawa Corporation and Ottawa Separate Schools Trustees v. Quebec Bank*, [1917] A.C. 76,

**CONSTL. LAW—(Continued.)**

considered. — Judgment of CLUTE J., 41 O.L.R. 594, reversed. *Ottawa Separate School Trustees v. Quebec Bank*, 637.

2. *Mechanics and Wage-Earners Lien Act*, R.S.O. 1914, ch. 140—*Power of Ontario Legislature to Create Lien Effective against Dominion Railway—Jurisdiction of Court to Award Personal Judgment where Lien-claim not Enforceable—Sec. 49 of Act—Jurisdiction of Officers to Try Actions under Act—County or District Court Judge—Sec. 33 of Act (6 Geo. V. ch. 30, sec. 1)—Intra Vires.*]—A lien claimed under the *Mechanics and Wage-Earners Lien Act*, R.S.O. 1914, ch. 140, cannot exist, or be enforced against the property of the Canadian Northern Railway Company — a Dominion company.—*Crawford v. Tilden* (1907), 14 O.L.R. 572, followed. — Although the lien claimed cannot be enforced in an action brought under the Act, the plaintiff may proceed to judgment under sec. 49.—*Kendler v. Bernstock* (1915), 33 O.L.R. 351, and *Baines v. Curley* (1916), 38 O.L.R. 301, applied.—The provisions of sec. 33 of the Act, as enacted by the amending Act, 6 Geo. V. ch. 30, sec. 1, are *intra vires* of the Ontario Legislature, so far as it is thereby directed that an action brought under the Act shall be tried, outside of the County of York, before a Judge of the County or District Court of the county or district in which the land is situate. *Johnson & Carey*

**CONSTL. LAW—(Continued.)**

*Co. v. Canadian Northern R.W. Co.*, 10.

See COMPANY, 3, 4.

**CONSTRUCTIVE FRAUD.**

See CONTRACT, 6.

**CONSTRUCTIVE TRUSTEE.**

See ASSIGNMENTS AND PREFERENCES

**CONTRACT.**

1. *Brokers—Members of Stock Exchange—Sale of Customer's Shares to another Member—Future Delivery—Sale not Made on Exchange—Failure of Purchaser to Pay for Shares—Obligation of Brokers—Breach of Contract—Adoption—Release—Action by Customer against Brokers—Assessment of Damages—Rules of Exchange—Judgment—Provisions for Benefit of Defendants in Case of Payment by Purchaser.*]—The plaintiff, being the owner of certain "pooled" shares of the capital stock of a mining company, instructed the defendants, who were brokers and members of an Exchange, to sell the shares at 55 or better, "seller's option 60 days or delivery 60 days." They sold them, at 60, to a broker, a member of the same Exchange; but the sale was not made upon the Exchange, and could not be recorded as an Exchange transaction. The purchaser paid for a portion of the shares and had delivery of a portion, but was in default as to the balance.—*Held*, that the obligation of the defendants was to make the sale on the



**CONTRACT—(Continued.)**

Exchange, and subject to the rules of the Exchange.—*Queensland Investment and Land Co. Limited v. O'Connell and Palmer* (1896), 12 Times L.R. 502, and *Forget v. Baxter*, [1900], A.C. 467, 479, followed.—Upon the evidence, the plaintiff had not so adopted the defendants' action as to release whatever claim he had against them.—The plaintiff was, therefore, entitled to recover whatever actual damage he could shew that he had sustained as a result of the defendants' breach of contract.—Having regard to the rules of the Exchange "governing clearing-house in respect of time contracts," which would have applied if the sale has been made on the Exchange, the plaintiff's damages should be assessed at \$750, being 25 per cent. of the purchase-price of the shares, the obligation of the buyer being to deliver to the manager of the clearing-house, on the third clearing day after the contract, a marked cheque for 25 per cent. of the purchase-price, for the security of the seller. That much the purchaser would doubtless have done; but what would or might have happened after that as to putting up margins or the sale of the purchaser's seat on the Exchange was too uncertain to form a basis for an assessment. — Judgment was directed to be entered for the plaintiff for \$750, with provisions for the benefit of the defendants, in case they succeeded in getting for the purchaser the whole or

**CONTRACT—(Continued.)**

part of the balance of the purchase-price. *McMahon v. Kiely Smith & Amos*, 294.

2. *Claim against Estate of Uncle of Plaintiff—Promise to Provide for Plaintiff—Consideration—Unenforceable Agreement—Death of Uncle—Omission to Provide for Plaintiff in Will—Promise of Principal Legatee under Will to Pay Plaintiff Sum of Money—Evidence—Promise not Made in Settlement of Doubtful Claim—Enforcement of Moral Obligation—Claim upon Promissory Notes Made by Testator—Interest—Costs—Appeal.*—An agreement alleged by the plaintiff to have been made between her and her uncle, to leave her a sum of money in his will, was *held*, not enforceable in an action against his executors.—And a promise, said to have been made by a son of the uncle was not, upon the evidence, which was all documentary, a promise made in order to settle a claim which was doubtful or believed by the parties to be doubtful; and the plaintiff's claim against the son failed.—A mere moral obligation to do that which the promisor agrees to do is not a valuable consideration.—The plaintiff was *held* entitled to judgment for the amount of two promissory notes made by her uncle in her favour, which were overdue, and interest thereon, and for the amount of the interest that was overdue upon the third note when the action was begun, the principal not being yet due.—The plain-

**CONTRACT—(Continued.)**

tiff was allowed the costs of a County Court action for the sums for which she had judgment, without set-off, and no costs were allowed to either party in respect of the claim upon which she failed or of an appeal from the judgment of the trial Judge. *Francis v. Allan*, 479.

3. *Company Incorporated under Laws of Ontario—Sale of Shares—Undertaking of Company with Purchasers to Resell or Repurchase—Individual Undertaking of Principal Officer—Action by Purchasers against Company and Individual to Recover Moneys Paid—Judgment by Default against Individual—Affirmance of Contract—Election—Fraud and Misrepresentation—Evidence—Damages—Rescission—Power of Company to Make Agreement to Resell—Money Lent—Company Failing to Become Bound as to Essential Part of Agreement—Effect as to Establishment of Contract—Costs of Action.*—The plaintiffs, two elderly spinsters, paid to the defendants, a company incorporated under the laws of Ontario, and S., who was the president of the company, certain sums of money, upon agreements executed by the company and S. personally, in the following or similar terms: "In consideration of . . . \$500 received, . . . from Miss M.W. and Miss H.W. . . . by the (company), in full payment of 5 shares of the par value of \$500, we hereby guarantee that, at any time after one year from the date

**CONTRACT—(Continued.)**

hereof, upon receiving 60 days' notice in writing that said Miss M.W. and Miss H.W. . . . wish to dispose of their holdings in our company, we will resell or repurchase said 5 shares of the par value of \$500 at par with . . . interest . . ." The plaintiffs became the holders of certificates for the stock of the company. They brought this action against the company and S. alleging fraud, misrepresentation, and other grounds for relief and claiming to recover the moneys they had paid. The writ of summons was specially endorsed; the defendant S. did not appear; and the plaintiffs entered final judgment against him for the sums paid by them and interest. As against the company, the action proceeded to trial, and it was held:—(1) That the plaintiffs could not recover damages for deceit: actual fraud had not been proved; but, if it had been, the plaintiffs, having taken final judgment against S., upon the contracts in respect of the shares, could not both affirm and repudiate them; the judgment against S. could have been only upon the claim upon the contracts; and the question whether a claim for damages for deceit, against several defendants, is merged in a final judgment upon it against one of them, did not arise.—(2) That, for the like reasons, the plaintiffs could not succeed upon a claim to set aside the transactions on the ground of actual fraud.—(3) That the plaintiffs' claim to set aside the transactions

**CONTRACT—(Continued.)**

on the ground of misrepresentation without actual fraud failed for want of proof of misrepresentation; and the election of the plaintiffs to affirm and enforce the contracts defeated a claim to set them aside.—(4) That the plaintiffs could not enforce against the company the agreements to resell or purchase; for such agreements were *ultra vires* of the company.—*Helwig v. Siemon* (1916), 10 O.W.N. 296, followed.—*Edwards v. Blackmore* (1918), 42 O.L.R. 105, referred to.—(5) That the plaintiffs could not recover from the company the moneys paid upon the allegation that they were moneys lent to the company.—*Semble*, that, if the plaintiffs had not affirmed the transactions, they would have been entitled to relief upon another ground: the company, if they failed to become bound according to the terms upon which they were to get the money, could not retain it; when an essential part is omitted, there is no contract.—*Morris v. Baron & Co.*, [1918] A.C. 1, followed. — The action as against the company was dismissed, but without costs. *Ward v. Siemon*, 113.

4. *Deposit Made by Father in Bank to Joint Credit of himself and Son—Document Signed by both—Survivorship of Son—Construction of Document—Direction to Bank—Evidence of Intention of Father—Will—Disposition of Estate—Testamentary Gift—Action against Executors and Legatee to Establish Right of Son to Money Deposited—Costs.*] — The plain-

**CONTRACT—(Continued.)**

tiff's father made a deposit of money in a bank, and he and the plaintiff signed a memorandum, addressed to the manager of the bank, saying that they thereby agreed jointly and severally with the bank and each with the other that any moneys which might from time to time be placed to the credit of their joint names and the interest thereon should be subject to withdrawal by either of them, and that the death of one should not affect the right of the survivor to withdraw such moneys and interest; and each of them irrevocably authorised the bank to pay any such moneys and interest to either of them and to the survivor. The money deposited was entirely that of the father, who died shortly afterwards. — *Held*, that the memorandum was not a contract between the father and son, but merely a direction to the bank; and the plaintiff was not entitled to succeed.—*Southby v. Southby* (1917), 40 O.L.R. 429, 432, followed.—Some of the evidence appeared to indicate that the purpose of the father was to make a gift to the plaintiff in its nature testamentary, which he could not effectually do save by an instrument executed as a will.—*Hill v. Hill* (1904), 8 O.L.R. 710, referred to.—Costs of all parties were ordered to be paid out of the father's estate. *Smith v. Gosnell*, 123.

5. *Formation—Sale of Goods—Telegrams—Agents' Bought and Sold Notes—Statute of Frauds—*



**CONTRACT—(Continued.)**

*Evidence — Letter Repudiating Contract—Omission of Statement of Time for Payment—"Shipment Opening Navigation"—"Terms Usual"—Custom of Trade—Immediate Payment where Shipment Deferred—Breach of Contract by Vendors—Damages—Costs.*—The defendants' agents in Alberta, on the 14th October, 1914, telegraphed to the defendants, who carried on business in Ontario, that they (the agents) had sold to the plaintiffs a carload of apples "choice winter pack at five cents for fifties, five and a quarter for twenty-fives, including commission, shipment opening navigation, they will pay insurance." On the 16th October the defendants answered, "Accept price." On that day the agents sent the defendants a bought note, which stated the terms of the contract as in the telegram, with the addition of: "Price f.o.b. East. Terms usual. Shipping instructions, opening navigation 1915." A bought note was also sent to the plaintiffs. On the 20th October, the defendants wrote to the agents: "I will return contract, as I find you have worded contract 'opening of navigation 1915.' I will not accept contract on these terms unless they will pay for the goods when packed—I will store them gratis. . . . I will accept contract, providing they will pay for car when packed, and allow you commission:"—*Held*, that, if the terms of the contract had not sufficiently appeared by the telegrams and

**CONTRACT—(Continued.)**

the bought note, the letter of the 20th October would have supplied a sufficient memorandum to satisfy the Statute of Frauds—none the less so that it contained a repudiation of the contract.—The question is not one of the intention of the person signing the contract, but merely of evidence against him.—*Bailey v. Sweeting* (1861), 9 C.B.N.S. 843, followed.—The contract was complete notwithstanding that the particular mode or time of payment was not stated.—*Valpy v. Gibson* (1847), 4 C.B. 837, followed. — "Shipment opening navigation" meant the opening of navigation in 1915; and, if the defendants failed to grasp the meaning of the despatch, that did not affect the validity of the contract.—There was no evidence —of a custom of trade or otherwise—that "terms usual" meant that payment should be made at the time of sale, without waiting for the time of shipment.—Therefore, there had been a breach of the contract by the defendants, and the plaintiffs were entitled to damages, but to nominal damages only; when the plaintiffs found that the defendants would not carry out the contract, they should have gone into the market and done the best they could with a similar contract; and there was no evidence of any particular rise in prices before March, 1915. — The plaintiffs were awarded \$5 damages with costs on the County Court scale; no set-off was allowed to the defendants, who had broken their

**CONTRACT—(Continued.)**

contract without any reasonable or valid excuse. *Campbell v. Mahler*, 395.

6. *Promise of Gift and Loan of Money to Trustees of Church—Death of Promisor—Vis Major—Impossibility of Performance—Constructive Fraud—Costs.*—An action by the trustees of a church against the administrator of the estate of a deceased member of the congregation to enforce an agreement made between the trustees and the member, whereby she was to make a gift of \$1,000 to the church as a contribution to a fund for the erection of a parsonage and lend \$1,500 to the trustees to be also expended in the erection of the parsonage, was dismissed, on the ground that her death had made the performance of the agreement, having regard to its terms and conditions and the delay of the trustees in proceeding with the building, impossible of performance; and that part of the promised money which was meant to be charity and that part which was meant to be for a consideration could not be separated.—The transaction, it was considered, was not open to attack on the ground of constructive fraud.—The dismissal of the action was without costs. *Reinhart v. Bugar*, 120.

7. *Purchase of Land by Physician from Patient—Confidential Relationship—Condition of Patient—Lack of Independent Advice—Unfairness of Agreement in*

**CONTRACT—(Continued.)**

*some Respects—Gift to Brother—Evidence.*—A medical man is placed in a position of trust and confidence towards his patient which requires from him the same degree of good faith, plain dealing, and guarded conduct which the law requires shall subsist between trustee and *cestui que trust* and in other relations of the same character. The rule stands upon a general principle applicable to all variety of relations in which dominion may be exercised by one person over another. And the principle applies both to gifts or voluntary conveyances and to contracts for valuable consideration, the only difference being that in the case of the latter, where the transaction is manifestly fair, evidence of independent advice may not be necessary.—*Huguenin v. Baseley* (1807), 14 Ves. 273, 291, 292, *Rowe v. Grand Trunk R.W. Co.* (1866), 16 U.C.C.P. 500, 506, *Vanzant v. Coates* (1917), 39 O.L.R. 557, 40 O.L.R. 556, and *Wright v. Carter*, [1903] 1 Ch. 27, 50, 54, 55, followed.—Where an elderly man, suffering from an incurable malady, made an agreement with his medical attendant for the sale to him of his house and land, at a price which was considered not an unfair one, and part of the purchase-money was to be paid after the patient's decease to his brother, it was held, considering the relationship of physician and patient, the condition, both mental and physical, of the deceased at the time of the agreement,

**CONTRACT**—(*Continued.*)

the absence of independent advice, and the unfairness of the agreement in certain aspects, that the agreement must be set aside as against both the physician and the brother: as against the latter, the case was stronger, for part of the purchase-money was made a gift to him. *Ralston v. Tanner*, 77.

8. *Sale and Delivery of Goods—Specifications—Times for Delivery—Instalments*—“*Current Contract*”—*Oral Evidence—Statute of Frauds—Breach of Contract—Repudiation—What Amounts to—Right to Rescind—Damages—Finding of Trial Judge—Appeal.*]—On the 23rd December, 1915, a contract was made for the sale and delivery by the defendant to the plaintiff of 1,000 tons of Hamilton pig-iron; and on the 25th September, 1916, another contract for 1,200 tons. The contracts were on printed forms, and it was a term of both that “all specifications are to be sent by buyer at least 15 days before time fixed for shipment.” In the earlier contract the time for delivery was stated to be “between date of completion of current contract and June 30th, 1916, in equal monthly instalments;” and in the later contract, “in about equal monthly instalments between January 1 and June 30, 1917.” None of the iron which was the subject of the contract of December, 1915, had been delivered; and the defendant set up, in answer to a claim for damages for breach,

**CONTRACT**—(*Continued.*)

that the plaintiff had lost its right to have the iron delivered because of failure to send specifications in due time:—*Held*, that what was meant by “current contract” might be shewn by parol evidence; it was established that, while there were two earlier contracts, the reference was to that of January, 1914, the only contract under which deliveries were being made in December, 1915, or under which the plaintiff was then entitled to have deliveries made; and the finding of the trial Judge that the plaintiff had supplied specifications for all the iron it had bought from the defendant, and that it was well understood by both parties that the specifications which had been supplied were to govern as to all the iron, unless the plaintiff should desire to vary them and send other specifications, was warranted by the evidence, and was sufficient to dispose of the contention of the defendant adversely to it.—The plaintiff also sought damages for breach of the contract of September, 1916, alleging that, although the time for commencing deliveries had not arrived, the defendant had, before the action was begun, repudiated the contract. The dispute as to this contract arose out of the controversy between the parties as to the contract of December, 1915, the plaintiff insisting on deliveries being made under it, and the defendant taking the position that it had ceased to exist. The defendant declared that it would make no deliveries



**CONTRACT—(Continued.)**

under the contract of September, 1916, until that question was settled:—*Held*, that, whether this meant that, unless the plaintiff would formally abandon its contention with regard to the earlier contract, no deliveries would be made under the later one, or that it would make no deliveries under the later contract until the dispute as to the earlier one was settled, there was such a repudiation of the defendant's obligation under the later contract as warranted the plaintiff in rescinding.—*In re Rubel Bronze and Metal Co. Limited and Vos*, [1918] 1 K.B. 315, and *Metropolitan Water Board v. Dick Kerr and Co. Limited*, [1918] A.C. 119, applied.—*Held*, as to damages, that, as what the defendant had agreed to sell was Hamilton pig-iron, and the market price of it was \$39, the plaintiff was entitled to recover the difference between that price and the contract price, even if other iron which would answer the same purpose could be bought at \$34. *Dominion Radiator Co. Limited v. Steel Co. of Canada*, 356.

9. *Sale of Lumber in Mill-yards*—*Written Agreement*—*Whole Contract*—*Invoice*—*Inspection*—*Property Passing*—*Destruction of Lumber by Fire*—*Cheque Given for Price before Fire*—*Payment Stopped after Fire*—*Action on Cheque*—*Fire Insurance*—*Payment to Vendor*—*Action Partly for Benefit of Insurers*—*Right of Vendor to Maintain*—*Counterclaim*—*Negligence*—*Warehouse*

**CONTRACT—(Continued.)**

*Receipt*—*Bank Act*, 53 Vict. ch. 31, sec. 2 (d.)—*Gratuitous Bailee*—*Reasonable Care*—*Cause of Fire*—*Condition of Engine in Yard*—*R.S.O. 1897, ch. 267—Evidence Negating Negligence.*—The plaintiffs, by writing dated the 14th June, 1910, agreed to sell to the defendant their "cut" of white pine lumber, in the yards of the T. company, "f.o.b. T.," at fixed prices for different grades, and according to terms of payment and delivery specified. The defendant had inspected the lumber before the agreement was made, an invoice of the lumber ready for delivery was sent by the plaintiffs to the defendant, and on the 27th June, the defendant sent to the plaintiffs' bankers a cheque for \$61,998.97, the price of the lumber according to the invoice, less 2 per cent. for cash. On the 30th June, a fire occurred in the lumber yards of the T. company, and the cut and piled lumber which was the subject of the agreement, as well as other lumber in the yards, was destroyed. The defendant stopped payment of the cheque, and this action was brought to recover the amount of it:—*Held*, that the writing embodied the whole contract between the parties; and that the property in the lumber had passed to the defendant before the fire.—At the time of the fire, the plaintiffs had existing insurance to the extent of \$50,000 upon the lumber in the yards, including that sold to the defendant. The insurance companies

**CONTRACT—(Continued.)**

paid the plaintiffs the full amount of \$50,000, and entered into an agreement with them, reciting that the total loss was \$82,972.15, the portion thereof pertaining to the lumber sold to the defendant \$63,264.25, and providing that the plaintiffs should sue the defendant upon his cheque, and, if successful, should pay to the insurance companies the surplus remaining after satisfying the plaintiffs' own loss and their costs and expenses:—*Held*, that the plaintiffs might properly bring the action upon the cheque, even though, if the action succeeded, the insurance companies might benefit thereby; and the plaintiffs were entitled to judgment for the amount of the cheque.—*Held*, also, having regard to the fact that a warehouse receipt for the lumber sold was signed by the plaintiffs and given to the defendant, which receipt stated on its face that it was to be regarded as a receipt under the provisions of the Bank Act, 53 Vict. ch. 31, and having regard to the meaning given by that Act, sec. 2 (*d.*), to the expression "warehouse receipt," that the plaintiffs were, at the time of the fire, gratuitous bailees for the defendant of the lumber sold, and were not bound to exercise more than reasonable care and diligence.—The T. company (defendants by counterclaim) operated on rails in their yards a small engine, equipped with boiler, smoke-stack, ash-pan, etc. It was not a standard railway engine such as used on ordinary

**CONTRACT—(Continued.)**

railways, but one of a smaller kind, used in mill-yards:—*Held*, that the Act to preserve the Forests from Destruction by Fire, R.S.O. 1897, ch. 267, had application to a mill-yard and an engine running upon rails therein.—And *held*, that the plaintiffs and their co-defendants by counterclaim had shewn that there was no such want of reasonable care on their part of the lumber in question as a prudent man would exercise with regard to his own property, and had negatived the charge of negligence made against them in the counterclaim. *Ferguson v. Eyer*, 190.

10. *Services Rendered by Niece of Deceased Intestate—Agreement to Pay for—Evidence—Implication—Presumption—Rebuttal—Sums Intrusted to Niece, not a Gift—Account—Set-off.*—The defendant, in December, 1908, brought her aunt, who was suffering from an incurable disease and required much care and attention, to her (the defendant's) house, and the defendant cared for the aunt until the aunt's death in November, 1911. In October, 1910, the aunt gave the defendant a large sum of money, and a larger sum in January, 1911. The administrators of the aunt's estate sought an account of these sums:—*Held*, upon the evidence, and having regard to all the circumstances, that the moneys were not a gift to the defendant, but were intended to enable the defendant

**CONTRACT—(Continued.)**

to pay the costs of the maintenance, nursing, medical supplies, and other necessities, of the aunt; and that, in accounting, the defendant was entitled to credit for a reasonable sum for her services, in addition to the sums which she had disbursed on her aunt's account—the evidence being sufficient to rebut the presumption, arising from the relationship of aunt and niece, that the services were gratuitous. — Review of the authorities.—*Walker v. Boughner* (1889), 18 O.R. 448, approved. *Mercantile Trust Co. of Canada Limited v. Campbell*, 57.

See CHOSE IN ACTION—COMPANY, 1, 3—INSURANCE—MUNICIPAL CORPORATIONS, 1 — PARTIES—SALE OF GOODS—VENDOR AND PURCHASER.

**CONTRACTOR.**

See WORKMEN'S COMPENSATION ACT.

**CONTRIBUTORY NEGLIGENCE.**

See HIGHWAY—MASTER AND SERVANT, 2—NEGLIGENCE, 4.

**CONVICTION.**

See CRIMINAL LAW—ONTARIO TEMPERANCE ACT.

**CORROBORATION.**

See CRIMINAL LAW.

**COSTS.**

1. *Action for Balance of Price of Goods—Dispute as to Quantity Sold—Findings of Fact of Trial*

**COSTS—(Continued.)**

*Judge—Failure of Plaintiff on Main Issue—Recovery of Small Sum—Plaintiff Ordered to Pay Defendants' Costs—Discretion of Trial Judge—Judicature Act, secs. 24, 74 (1)—Appeal.*—The plaintiff sued the defendants for \$1,432.65, the balance of the price of a stock of glue which he alleged he had sold to the defendants. There was a dispute between the parties as to the quantity of glue that had been sold. The glue was in two lots, one a small lot, upon the plaintiff's own premises, the other a larger lot, in a warehouse. Both lots were sent to the defendants; they refused to accept the larger lot, and endeavoured to return it, but the plaintiff would not receive it back. The trial Judge (there was no jury) gave judgment for the plaintiff for the price of the small lot only, \$162.85, and directed that the plaintiff should pay the defendants' costs of the action, less the \$162.85:—*Held*, upon appeal, that the finding of the trial Judge upon the evidence could not be disturbed, and the Court could not interfere with his discretion as to the costs: secs. 24 and 74 (1) of the Judicature Act, R.S.O. 1914, ch. 56.—Discussion of the extent of the discretion of the Court as to costs and reference to authorities.—*Le Page v. Laidlaw Lumber Co. Limited*, 400.

2. *Security for Costs—Company out of Ontario Brought into Winding-up in Ontario and Desiring to Appeal from Interim Report*



**COSTS—(Continued.)**

—*Inherent Power to Order Security for Costs of Appeal—Amount of Security—Practice—Action Brought in Name of Company in Liquidation—Termination by Incorporation in Winding-up—Style of Cause—Jurisdiction to Order Security—Master Having Conduct of Reference—Order Made by Master in Chambers without Jurisdiction—Affirmance by Judge in Chambers—Order of Judge Treated as Substantive Order—Appeal—Order Varied.*]

Where a person not resident in Ontario is brought into an action in Ontario, either by being personally served abroad, or on his application to be added as a party defendant, and, after having been heard, is unsuccessful and desires to appeal, the Court has inherent power to order him to give security for the costs of the respondent or respondents in the proposed appeal.—The amount of security should be sufficient only to cover the costs of such appeal.—Where proceedings for the winding-up of a company had been begun, and an action was brought in the name of the company, by leave granted in those proceedings, and an order was subsequently made referring the matters in question in the action to the Master, "to be heard and determined by him in the winding-up proceedings and as part thereof."—*Held*, that the action as a proceeding collateral to the winding-up was terminated and ceased to exist: there is no such thing as consolidation of an action and a winding-

**COSTS—(Continued.)**

up.—Where the proposed appeal is from a report of the Master to whom the winding-up has been referred, the application for security for the costs of the appeal should be made to that Master—the Master in Chambers, not being the Master in charge of the reference, has no jurisdiction.—The order of *FALCONBRIDGE, C.J.K.B.*, which affirmed an order of the Master in Chambers requiring the appellant in a proposed appeal from a report of the Master in Ordinary to give security for costs, was treated as a substantive order, and affirmed upon appeal, subject to variation as to the style of cause and the amount of the security; *MACLAREN, J.A.*, dissenting. *Bailey Cobalt Mines Limited v. Benson*, 321.

*See* CHOSE IN ACTION—CONTRACT, 2, 3, 4, 5, 6—EXECUTORS AND ADMINISTRATORS—MASTER AND SERVANT, 2—SOLICITOR—WILL, 1, 3.

**COUNTERCLAIM.**

*See* CONTRACT, 9—SALE OF GOODS, 1.

**COUNTY COURT JUDGE.**

*See* CONSTITUTIONAL LAW, 2.

**COURTS.**

*See* APPEAL—CONSTITUTIONAL LAW, 2.

**COVENANT.**

*See* CHOSE IN ACTION.

**CREDITORS.**

*See* ASSIGNMENTS AND PREFERENCES.

**CRIMINAL LAW.**

*Procuring Girls for Unlawful Carnal Connection with Men—Criminal Code, sec. 216 (1) (a) (3 & 4 Geo. V. ch. 13, sec. 9)—Evidence—“Procure”—Bringing Prostitutes and Men together—Proof of Offence—Corroboration—Indictment—Uncertainty—Duplicity.]—* The defendant was charged, under sec. 216 (1) (a) of the Criminal Code, as enacted by 3 & 4 Geo. V. ch. 13, sec. 9, for that he did at divers times between two named dates, at the city of O., “unlawfully procure girls to have carnal connection with another person or persons within Canada,” and was tried thereon and convicted by a County Court Judge:—*Held* (HODGINS, J.A., dissenting), that the conviction should be quashed.—*Per* MEREDITH, C.J.O., and MAGEE and FERGUSON, J.J.A.:—The defendant was a cab-driver and the girls mere prostitutes; what the defendant did was to drive the girls and men who wished to have carnal connection with the girls to a place where they could and did have it. This was not “procuring” the women to have intercourse with the men; nor did the fact that it was the defendant who brought them together for that purpose make it “procuring.” What the defendant did was not an offence within the meaning of the statute.—*Per* CLUTE, J.:—The indictment or charge was bad

**CRIMINAL LAW—(Continued.)**

for uncertainty and for having charged in one count more offences than one.—Section 852 of the Criminal Code considered.—Review of the authorities.—*Rex v. Thompson*, [1914] 2 K.B. 99, referred to. *Rex v. Quinn*, 385.

*See* ONTARIO TEMPERANCE ACT.

**CUSTOM OF TRADE.**

*See* CONTRACT, 5.

**CUSTOMER.**

*See* CONTRACT, 1.

**DAMAGES.**

*See* COMPANY, 4—CONTRACT, 1, 3, 5, 8—HIGHWAY, 1—INTEREST—MASTER AND SERVANT, 2—MUNICIPAL CORPORATIONS, 3—NEGLIGENCE, 1—SALE OF GOODS, 1.

**DEATH.**

*See* CONTRACT, 6—INSURANCE, 3—NEGLIGENCE, 1, 4—RAILWAY, 2.

**DEED.**

*See* WAY, 2.

**DEFAMATION.**

*See* LIBEL.

**DEPOSIT.**

*See* CONTRACT, 4—VENDOR AND PURCHASER, 1.

**DEVISE.**

*See* WILL, 1.

**DIRECTORS.**

*See* COMPANY, 1, 2.

**DISCOVERY OF MINERALS.***See* MINES AND MINERALS.**DISCRETION.***See* COSTS, 1—PARTIES.**DISMISSAL OF SERVANT.***See* MASTER AND SERVANT, 1.**DOMICILE.***See* INSURANCE, 3.**DUPLICITY.***See* CRIMINAL LAW.**DURESS.**

*Action on Cheque Given in Order to Obtain Release from Custody—Arrest in Massachusetts of Resident of Ontario—Law of Massachusetts—Capias—Fraud—Defence to Action.*—There being a dispute between the defendant, doing business in Ontario, and a trading company in Boston, Massachusetts, as to the liability to pay for or to pay damages for the non-acceptance of certain machines which had been sent by the company to Ontario, the defendant wrote to the manager of the company stating that he (the defendant) would call on the company in Boston and endeavour to make an amicable settlement. This was at once assented to by the manager, who, as advised by the plaintiff, the company's attorney, intended to allow the defendant to come into Massachusetts at his own instance, and without being procured to come by the company, and that he should then be arrested under a capias for the

**DURESS—(Continued.)**

claim asserted by the company. The defendant went to Boston, called on the manager, and found that no arrangement could be made. He was then arrested upon process obtained earlier in the day, upon an affidavit sworn by the manager, before any meeting had taken place. The defendant, failing to obtain bail, sent for the manager and offered to pay for the machines, and proceeded to draw a cheque upon a bank in Ontario for the amount, but the manager refused to accept the cheque. The plaintiff then intervened and offered to take the defendant's cheque and give his own cheque to the company for the amount, less his fee. The defendant gave his cheque, and was released. The plaintiff gave the defendant a receipt for the cheque, "which when paid will be in full settlement and discharge" of the claim of the company. The defendant stopped payment of his cheque. The plaintiff gave his cheque to the company, but it was not cashed by the company until after the dishonour of the defendant's cheque was known:—*Held*, upon consideration of the law of Massachusetts, that the manager of the company acted fraudulently when he formed the plan to arrest, and, concealing this, permitted the defendant to walk into the net spread for him, and swore to all that was necessary to accomplish the arrest before he entered upon any discussion. The fraud was the procuring of the defendant's attornment to



**DURESS—(Continued.)**

the jurisdiction of the Courts of Massachusetts; and the intent to secure arrest while arranging an interview to negotiate a settlement was the gist of the fraud.—*Stein v. Valkenhuysen* (1858), E. B. & E. 65, *Grainger v. Hill* (1838), 4 Bing. N.C. 212, and *Duke de Cadaval v. Collins* (1836), 4 A. & E. 858, followed.—*Held*, also, that the duress afforded the defendant an ample defence to the plaintiff's action upon the cheque. *Blanchard v. Jacobi*, 442.

**EASEMENT.**

See *WAY*.

**ELECTION.**

See *COMPANY*, 4—*CONTRACT*, 3.

**ENGINEER.**

See *MUNICIPAL CORPORATIONS*, 4.

**ESTATE.**

See *TRUSTS AND TRUSTEES—WILL*, 1.

**EVIDENCE.**

See *COMPANY*, 3—*CONTRACT*, 3, 5, 7, 8, 9, 10 — *CRIMINAL LAW—NEGLIGENCE*, 3, 4 — *ONTARIO TEMPERANCE ACT*, 1—*RAILWAY*, 1, 2—*WILL*, 2, 3, 5.

**EXECUTED CONTRACT.**

See *MUNICIPAL CORPORATIONS*, 1.

**EXECUTED TRANSACTION.**

See *HUSBAND AND WIFE*.

**EXECUTION OF WILL.**

See *WILL*, 2, 3, 5.

**EXECUTORS AND ADMINISTRATORS.**

*Charge of Fraud against Executors—Failure to Prove—Finding of Trial Judge—Appeal—Position of Executors—Bare Trustees—Purchase from Cestui que Trust—Limitations Act, secs. 46, 47, 48—Acting Honestly and Reasonably—Liability of Executor to Account as Individual for Proceeds of Sale of Lot Conveyed to him—Absence of Concealed Fraud—Bar by Statute—Claim to Share of Fund Found by Surrogate Court Judge to be in Hands of Executors—Order on Passing Accounts—Finality—Right to Recover Share of Fund by Action—Settled Account—Interest—Costs.]—Under a will, the defendants, two of the four sons of the testator, were trustees of property which vested in them, and was to be distributed among the four in equal shares, the distribution being left in the hands of the four individually, and not in the hands of the defendants as trustees and executors. The complaint of the plaintiff, one of the four, was that, certain residuary real estate having been apportioned in shares, the defendants, by fraud, obtained from the plaintiff a deed of his share, sold it to an innocent purchaser, and then laid out the proceeds in other land, on which they had made a profit:—*Held*, that no fraud or overreaching on the part of the defendants had been shewn.—The defendants as to the division did not stand towards the plaintiff in a fiduciary relationship: they were bare trustees, bound to divest them-*

**EXS. & ADMORS.**—(*Continued.*) selves of the legal estate in the way determined by the four; and were not brought within the rule against purchases from *cestuis que trust*; but, assuming that they were trustees, they acted honestly and reasonably, and should, after the lapse of many years, have the benefit of secs. 46, 47, and 48 of the Limitations Act, R.S.O. 1914, ch. 75.—And *held*, as to R., that, having got lot 2 as part of his share, and having sold it and received the proceeds, he should account personally to the plaintiff for his share thereof, were it not that the Limitations Act was a bar in his case also—there was no concealed fraud which prevented him from claiming the benefit of the statute.—The plaintiff also claimed in this action to recover one quarter of the amount found by a Surrogate Court Judge to be in the hands of the defendants as executors. It appeared that the Judge had, in taking the accounts, allowed the parties for all the payments made by them during the father's lifetime in order to preserve the property, and had deducted the amount of these payments from the amount for which the executors were chargeable:—*Held*, that the evidence before the Judge warranted this, and his approval was final and binding upon all the parties represented, except in so far as fraud or mistake might be shewn.—*In re Wilson and Toronto General Trusts Corporation* (1908), 15 O.L.R. 596, followed.—*Held*, also, that the plaintiff was en-

**EXS. & ADMORS.**—(*Continued.*) titled to bring an action upon the footing of these accounts just as if they were settled accounts, in case due payment was not made by the executors, or might make an application for an administration order if circumstances warranted that course.—*Held*, therefore, that the plaintiff was entitled to judgment for his share of the moneys in the hands of the defendants, with such interest as the amount had borne since it was paid into Court in this action.—*Held*, also, in view of the way in which the charge of fraud was persisted in, that the plaintiff should have no costs of the action, and the defendants should have their costs as executors out of the estate down to the date of the payment into Court, of which the share of the plaintiff should pay one quarter, and the plaintiff should pay the defendants' costs after the date of payment into Court, and that there should be no costs of the appeal.—*Bruty v. Edmundson*, [1917] 2 Ch. 285, [1918] 1 Ch. 112, referred to. *Tyrrell v. Tyrrell*, 272.

See CONTRACT, 2, 10—WILL, 4.

### EXPLORATION.

See MINES AND MINERALS.

### EXPLOSIVES.

See MUNICIPAL CORPORATIONS, 4—NEGLIGENCE, 3.

### EXTRA PROVINCIAL CORPORATIONS ACT.

See COMPANY, 3.

**FATAL ACCIDENTS ACT.**

See NEGLIGENCE, 1.

**FINES AND PENALTIES.**

*Action for Penalties against Company and Secretary—Ontario Companies Act, 2 Geo. V. ch. 31, sec. 134—Default in Making out and Transmitting Summaries to Provincial Authority—Secretary “Wilfully” Permitting Default (sub-sec. 6)—Finding of Trial Judge—Appeal—Remission of Full Penalties upon Payment of Substantial Sum.*—The secretary of a company, as well as the company itself, which was incorporated under the Ontario Companies Act, 2 Geo. V. ch. 31, by letters patent issued in 1913, was held liable for penalties incurred under sec. 134 (6) of the Act, by reason of default in making out and transmitting to the Provincial Secretary, on or before the 8th February in the years 1915 and 1916, the summary statement prescribed by sub-secs. (1) to (5) of sec. 134.—By sub-sec. (6), the secretary of a company is liable to penalties only when he wilfully authorises or permits the default; and in this case it was held by LATCHFORD, J., that the conduct of the secretary shewed that he wilfully permitted the default.—*Park v. Lawton*, [1911] 1 K.B. 588, applied and followed.—Judgment was given in favour of the plaintiff, a private person suing on her own behalf with the written consent of the Attorney-General, for penalties amounting to \$12,760.—The judgment of LATCHFORD, J., was affirmed by a

**FINES & PS.—(Continued.)**

Divisional Court of the Appellate Division; but that Court, by way of granting some relief from the penalties, ordered (thereby varying the judgment of MIDDLETON, J., 40 O.L.R. 301) that, upon the plaintiff realising \$4,000 and interest under the judgment, the plaintiff should release and discharge the judgment as against both defendants. *Seagram v. Pneuma Tubes Limited*, 513.

**FIRE.**

See CONTRACT, 9—VENDOR AND PURCHASER, 2.

**FIRE BRIGADE.**

See MASTER AND SERVANT, 1.

**FIRE INSURANCE.**

See INSURANCE, 2.

**FIXTURES.**

See MORTGAGE, 2.

**FOREIGN LAW.**

See DURESS.

**FORFEITURE.**

See VENDOR AND PURCHASER, 1.

**FORMATION OF CONTRACT.**

See CONTRACT, 5.

**FRAUD AND MISREPRESENTATION.**

See CHOSE IN ACTION—COMPANY, 1, 3—CONTRACT, 3, 6—DURESS—EXECUTORS AND ADMINISTRATORS—SALE OF GOODS, 1.



**GIFT.**

See CONTRACT, 4, 6, 7, 10—  
MUNICIPAL CORPORATIONS, 2—  
WILL, 5.

**HIGHWAY.**

1. *Nonrepair—Accident to Motor-vehicle—Injury to Passenger—Dangerous Approach to Narrow Bridge—Nonfeasance and Misfeasance of Township Municipality—Duty under sec. 460 of Municipal Act, R.S.O. 1914, ch. 192—Needs of Traffic—Proximate Cause of Accident—Contributory Negligence of Driver—Passenger not Responsible for—Extent of Injury—Assessment of Damages.*] A highway may be out of repair, within the meaning of sec. 460 of the Municipal Act, although there is no disrepair in the sense of dilapidation: the statute requires that the highway be kept in a condition reasonably sufficient for the needs of the traffic over it, where the municipal corporation have a margin of taxation power more than enough for the purpose.—*Ackersviller v. County of Perth* (1914), 32 O.L.R. 423, 428, followed.—A turn which had to be made, going north upon a road at a bridge, was too sharp, and the bridge was too narrow. At this place an accident happened to a motor-car in which the plaintiff was a passenger, by reason of which he was injured:—*Held*, that the defendants were guilty of neglect of the duty imposed upon them by statute, to keep the highway in repair at the place where the accident happened.—*Semle*, that there was

**HIGHWAY—(Continued.)**

also misfeasance on the part of the defendants.—*Webb v. Barton Stoney Creek Consolidated Road Co.* (1895), 26 O.R. 343, referred to.—Municipalities with low assessments and low taxation should not be encouraged in any such notion as that such a bridge as above described was enough for the needs of traffic—that such a highway was kept in repair by such a structure.—*Held*, also, that the want of repair of the road, and not the negligence of the driver of the car, was the proximate cause of the accident.—If there had been contributory negligence on the part of the driver, the plaintiff would not have been responsible for it: the driver was not the servant or agent of the plaintiff or subject to his orders or control, and there was no evidence that the plaintiff had anything to do or say regarding the manner in which the approach to the bridge was made.—Discussion as to the extent of the plaintiff's injuries. *Raymond v. Township of Bosanquet*, 434.

2. *Nonrepair—Road in Rural Municipality—Injury to Person in Motor-vehicle—Negligence—Duty of Municipality in Respect of Motor-vehicles—Rate of Speed—Rate of Speed—Carelessness of Driver—Knowledge of Bad Place in Road—Driver under Statutory Age—Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 13 (7 Geo. V. ch. 49, sec. 10)—Unlawful Use of Highway.*]—In an action by a husband and wife to recover

**HIGHWAY—(Continued.)**

damages from a township corporation for injuries caused to the wife, by reason of a motor-vehicle in which she was being driven, along a road in the township, dropping into a hole at the edge of a bridge forming part of the roadway, it appeared that the vehicle was owned by the husband, and was, at the time of the occurrence, being driven by the plaintiffs' son, a boy under 16 years of age, and that the speed of the vehicle, as it descended a hill and passed off the bridge, was between 15 and 20 miles an hour. The son had driven the vehicle over the same place two days before, and he and the plaintiffs then felt a bump as they passed from the road to the bridge:—*Held*, that the son's duty, having regard to the knowledge which he had of the condition of the road at the bridge, was to have driven with caution off the bridge; his carelessness was the cause of the injury to his mother; and, although the road was not in good repair for motor-vehicle traffic, at the speed the plaintiffs were travelling, there was no negligence on the part of the defendants, and the plaintiffs were not entitled to recover damages.—*Held*, also, that the plaintiffs were identified with their driver; his negligence was theirs; the father knew that his son, owing to his youth, was prohibited by the Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 13, as amended by 7 Geo. V. ch. 49, sec. 10, from driving a motor-

**HIGHWAY—(Continued.)**

vehicle; and yet it was by the father's authority, and with the concurrence and sanction of his co-plaintiff, that the boy was driving.—The use of the highway which the son was making, at the instance of the plaintiffs, was unlawful—they were unlawfully upon the defendants' highway.—Review of the authorities.—A rural municipality is not bound to maintain its roads in such repair that they shall be safe for motor-vehicles driven at the speed at which the plaintiffs were proceeding.—*Dictum* of MEREDITH, C.J.O., in *Davis v. Township of Usborne* (1916), 36 O.L.R. 148, 151, explained. *Roe v. Township of Wellesley*, 214.

See NEGLIGENCE, 2, 3, 4—  
STREET RAILWAY.

**HIGHWAY CROSSING.**

See NEGLIGENCE, 2—RAILWAY, 2.

**HUSBAND AND WIFE.**

*Security Given by Wife at Instance of Husband for Liability of Husband to Employers—Consideration—Stifling Prosecution—Executed Transaction—Failure to Give Affirmative Proof of Pressure or Undue Influence—Action to Set aside Security—Findings of Fact of Trial Judge—Appeal.*—The plaintiff's husband, who sold hay for the defendants and made collections of money, was or appeared to be in default to them in respect of his collections to the extent of \$696. Being in fear of criminal prosecution and

**HUSBD. & WIFE**—(*Continued.*)  
 of losing his employment, he informed the plaintiff of the situation, and asked her to give a chattel mortgage upon her furniture to secure the \$696. This she did; the husband was not arrested and was continued in his employment: — *Held*, that, the transaction being executed, it was necessary, in order to obtain relief in equity, that the plaintiff should shew more than that it was illegal: she must shew either pressure or undue influence and the findings of the trial Judge that the plaintiff was a free agent in the transaction, that there was no agreement that, in consideration of the giving of the mortgage, the defendants would not prosecute her husband, that she appreciated what the giving of the mortgage meant, and that she had failed to shew affirmatively that the defendants procured her to execute the mortgage through pressure or undue influence, were supported by the evidence, and were sufficient to warrant the dismissal of the action.—*Wood v. Adams* (1905), 10 O.L.R. 631, 637, 638, and *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, 182, referred to. *Fairweather v. McCullough*, 299.

See ONTARIO TEMPERANCE ACT, 2.

#### IMMORALITY.

See MASTER AND SERVANT, 1.

#### INDEPENDENT ADVICE.

See CONTRACT, 7.

#### INDEPENDENT CON-TRACTOR.

See MASTER AND SERVANT, 2.

#### INDICTMENT.

See CRIMINAL LAW.

#### INFANT.

See NEGLIGENCE, 1, 3.

#### INJUNCTION.

See COMPANY, 1.

#### INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES—COMPANY, 4.

#### INSPECTOR OF ESTATE.

See ASSIGNMENTS AND PREFERENCES.

#### INSURANCE.

1. *Accident Insurance*—*Total Disability Claim*—*Cause of Disablement*—"Accident"—*Assault*—*Heart-disease*—*Probability of Previous Existence*—*Absence of Knowledge of Assured*—*Insurance Act R.S.O. 1914, ch. 183, sec. 172 (1)*—*Change of Occupation*—*Materiality*—*Sec. 156 of Act*—*Renewal of Policy*—*Terms of*—*Attempt to Introduce New Term in Renewal Receipt*—*Application for Insurance*—*Findings of Trial Judge*—*Appeal*.]—In an action upon a policy of accident insurance, it was alleged that the plaintiff was totally and permanently disabled as the result of injury sustained in a fight with another man:—*Held*, that the disability from which the plaintiff suffered began on the 15th October, 1915, the day of the fight, and that previously



**INSURANCE—(Continued.)**

he had enjoyed good health; and, even if his heart was affected before that date, without his knowledge, the disablement resulted "from bodily injuries effected directly and independently of all other causes through accidental means, and as the direct result of some cause not attributable to the assured's state of health."—*Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A.C. 592, applied and followed.—*Held*, also, that the finding of the trial Judge that the plaintiff was not the aggressor in the fight, but was assaulted by A., was warranted by the evidence; and the plaintiff's injuries were thus effected by accidental means. — *Per CLUTE, J.* :—Upon the proper construction of sec. 172 (1) of the Insurance Act, R.S.O. 1914, ch. 183, the injuries sustained by the plaintiff from the assault upon him by A. came within the definition of "accident" in that enactment.—*Held*, also, that the plaintiff's change of occupation from a less to a more hazardous one, without disclosure of it upon the renewal of the policy, did not avoid the policy. The change was not material to the risk; and the plaintiff's injuries were not caused by anything connected with his occupation of drover.—Section 156 of the Insurance Act considered.—*Per CLUTE, J.* :—Sub-section 3 of sec. 156 refers to a misrepresentation in the original application, not in the application to renew.—The attempt to

**INSURANCE—(Continued.)**

introduce a new term in the renewal receipt, when the policy was renewed, was ineffectual, because the renewal did not constitute or create a new policy, and sec. 156 (1) provides that all the terms and conditions of the policy shall be set out on the face or back thereof. *Morran v. Railway Passengers Assurance Co. of London England*, 561.

2. *Fire Insurance—Contents of Barn—Hay Stacked outside not Included—Limitation of Liability—Provision in Application—Whether Forming Part of Contract—Insurance Act, R.S.O. 1914, ch. 183, secs. 156 (1), (3), 193 (1)—Statutory Condition 8—Mutual Insurance Company—Membership in, of Assured—By-law—Value of Property Destroyed—"Estimated Value"—Percentage of, only Insured—Absence of Proof of Excess.*—The defendants issued a policy insuring the plaintiff to the extent of \$1,600 against loss by fire in respect of the ordinary contents of a barn. During the currency of the policy, the barn was burned, with its contents, which were admittedly of the cash value of \$850. A term in the application for the insurance, signed by the plaintiff, was that "not more than two-thirds of the cash value of any building or personal property will be insured by this company." The policy referred to the application as forming part of the policy. By the policy itself, the insurance was against loss or damage

**INSURANCE**—(*Continued.*)

by fire to the amount of \$1,600, "such loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen." No statement of the cash value appeared in the application. On the back of the policy was printed statutory condition 8 :—*Held*, by the majority of the Court, that the plaintiff, having applied for \$1,600 insurance on the contents of his barn, and having by his application indicated his agreement with the statement that the defendants would not insure more than two-thirds of the value or estimated value, was entitled to rely upon condition 8 and to treat the contract as based upon the fact that the amount of insurance applied for and granted was within the two-thirds limit; and it was not necessary to consider whether the application was really made part of the contract.—A by-law of the insurance company (defendants) restricted the company from insuring more than two-thirds of the estimated value. The plaintiff, as a policy-holder, was a member of the company; and it was argued that he could not claim more than two-thirds of the loss :—*Held*, that, as there was no proof that \$1,600 exceeded two-thirds of the estimated value, the defendants were not aided.—Judgment of LATCHFORD, J., in favour of the plaintiff for the recovery of the full sum of \$850, affirmed.—*Per* LATCHFORD, J.:—Hay stacked

**INSURANCE**—(*Continued.*)

outside the barn could not be considered to be included in the "contents" insured. *Forsyth v. Walpole Farmers Mutual Fire Assurance Co.*, 236.

3. *Life Insurance—Change of Beneficiary—Preferred Class—Declaration in Writing—Sufficiency—Insurance Act, sec. 171 (5)—"Soldier's Will"—Printed Form—"Personal Estate"—Inclusion of "Insurance Policy"—Effect of Printed Explanatory Clause—Policy Payable in Ontario—Assured Domiciled in British Columbia—Application of Law of Ontario.*—In 1904, R., then domiciled in Manitoba, insured his life for \$2,000 in an insurance company, having its head office in Ontario. The loss was payable at the company's head office, to R.'s mother, who was domiciled in Ontario. In 1906, R. went to live in British Columbia and became domiciled there. He went overseas in January, 1917, having married in June, 1916. Before leaving, he executed a "soldier's will" upon a printed form, and thereby bequeathed all his personal estate to his wife. By a clause printed as part of the will, above the testimonium clause, it was declared that "personal estate" included "insurance policy." R. was killed in action in November, 1917. The \$2,000 insurance moneys were claimed by his mother and by his widow:—*Held*, following *Re Monkman and Canadian Order of Chosen Friends*

**INSURANCE**—(Continued.)

(1918), 42 O.L.R. 363, that under the law of Ontario (the Insurance Act, R.S.O. 1914, ch. 183, sec. 171 (5)) the will was sufficient to change the beneficiary from the mother to the wife.—And *held*, adopting the view of some of the Judges in *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, that the power exercised by R. was, or was analogous to, a power of appointment, and was governed not by the law of his domicile (British Columbia), but by the law of Ontario.—*Held*, therefore, that the widow was entitled to the moneys. *Re Hewitt and Hewitt*, 286.

See CONTRACT, 9 — VENDOR AND PURCHASER, 2.

**INTEREST.**

*Action for Damages for Personal Injuries — Findings of Jury — "Verdict" — Judgment on Findings in Favour of Defendants — Affirmance by Court of Appeal — Reversal by Supreme Court of Canada — Judgment for Amount of Damages Found by Jury — Interest on Amount of Judgment from Date of first Judgment — Whether Recoverable — Judicature Act, secs. 35 (4), 60, 61.]*—The jury's answers to questions submitted to them by the trial Judge are not a "verdict" within the meaning of sec. 35 (4) of the Judicature Act, R.S.O. 1914, ch. 56.—The effect of secs. 60 and 61 of the same Act, considered.—This action, which was in tort for damages for

**INTEREST**—(Continued.)

personal injuries, was tried with a jury, in June, 1897; questions were submitted to the jury, and on the answers the trial Judge directed judgment to be entered for the defendants. This judgment was affirmed on appeal to the Court of Appeal; but, on a further appeal to the Supreme Court of Canada, the judgments below were reversed, and it was directed (in October, 1899) that judgment should be entered in favour of the plaintiff for \$1,500, at which sum the jury had assessed the plaintiff's damages:—*Held* (CLUTE, J., dissenting), that the plaintiff was not entitled to interest on the \$1,500 from June, 1897, to October, 1899.—Review of the legislation and authorities upon the subject of interest upon sums awarded by verdict or judgment. *Rowan v. Toronto R.W. Co.*, 164.

See CONTRACT, 2—EXECUTORS AND ADMINISTRATORS.

**INTOXICATING LIQUORS.**

See ONTARIO TEMPERANCE ACT.

**JOINDER OF PARTIES.**

See PARTIES.

**JUDGE'S CHARGE.**

See MASTER AND SERVANT, 2.

**JUDGMENT.**

See ASSIGNMENTS AND PREFERENCES—CONTRACT, 1, 3—INTEREST—SALE OF GOODS, 1.



**JURISDICTION.**

See CONSTITUTIONAL LAW, 2—  
COSTS, 2—RAILWAY, 2—WORK-  
MEN'S COMPENSATION ACT.

**JURY.**

See INTEREST—MASTER AND  
SERVANT, 2—NEGLIGENCE, 3—  
RAILWAY, 2—STREET RAILWAY.

**JUSTICE OF THE PEACE.**

See ONTARIO TEMPERANCE ACT.

**JUSTIFICATION.**

See MASTER AND SERVANT, 1.

**LAND.**

See LIMITATION OF ACTIONS—  
MINES AND MINERALS—MORT-  
GAGE—WAY.

**LANDLORD AND TENANT.**

See MORTGAGE, 2.

**LEAVE TO APPEAL.**

See APPEAL.

**LIBEL.**

*Newspaper* — Notice before  
Action—*Libel and Slander Act*,  
sec. 8 (1)—Notice not Addressed  
to Defendant—Dismissal of Action  
—Appeal—Divided Court.]— In  
an action for libel contained in a  
newspaper, the notice required  
by sec. 8 (1) of the Libel and  
Slander Act, R.S.O. 1914, ch. 71,  
must be given to the defendant:  
notice to the editor of the news-  
paper is not sufficient.—So held,  
by MIDDLETON, J., who dis-  
missed this action upon a sum-  
mary application for judgment,  
following *Burwell v. London Free  
Press/ Printing Co.* (1895), 27  
O.R. 6, and *Benner v. Mail*

**LIBEL—(Continued.)**

*Printing Co.* (1911), 24 O.L.R.  
507.—Upon appeal, a Divisional  
Court was divided in opinion,  
and the judgment of MIDDLE-  
TON, J., stood. *Dingle v. World  
Newspaper Co.*, 218.

**LICENSE.**

See COMPANY, 3, 4.

**LIEN.**

See COMPANY, 4—CONSTITU-  
TIONAL LAW, 2—VENDOR AND  
PURCHASER, 2—WILL, 4.

**LIFE INSURANCE.**

See INSURANCE, 3.

**LIMITATION OF ACTIONS.**

Action for Recovery of Land—  
Defence under Limitations Act,  
secs. 5, 6 (4) — Land in State of  
Nature — Acts of Possession—  
Cutting Timber—Pasturing Cattle  
— Fencing — Payment of Taxes  
— Relationship of Parties—Absent  
Nephew—Uncle in Loco Parentis  
— Bailiff.]—To an action begun  
in 1917, to recover possession  
of the north part of a lot, the de-  
fendant pleaded the Limitations  
Act: — Held, that, in order to  
acquire title under the statute  
(see R.S.O. 1914, ch. 75, secs. 5  
and 6(4)), open, visible, exclusive,  
and continuous possession was  
necessary; and the acts of the  
defendant—payment of taxes,  
fencing, cutting and removing  
timber, and pasturing cattle—  
were not sufficient to shew  
such a possession as was requi-  
site.—Held, also (MULOCK, C.J.  
Ex., expressing no opinion, and  
FERGUSON, J.A., dissenting), that

**LIMN. OF ACTS.**—(*Continued.*) the defendant, having, according to his own evidence, continued the use of the land after the plaintiff left in the same way as before, when he stood in *loco parentis* to the plaintiff, was baliff thereof for the plaintiff, and his possession was not adverse, at least until 1908, when he conveyed away part of the land.—Review of the authorities. *McLeod v. McRae*, 34.

See EXECUTORS AND ADMINISTRATORS.

### LIQUOR.

See ONTARIO TEMPERANCE ACT.

### LOAN.

See COMPANY, 1—CONTRACT, 6.

### LOAN AND TRUST CORPORATIONS ACT.

See COMPANY, 4.

### MAGISTRATE.

See ONTARIO TEMPERANCE ACT.

### MANUFACTURER'S WARRANTY.

See SALE OF GOODS, 2.

### MARRIED WOMAN.

See HUSBAND AND WIFE.

### MASTER AND SERVANT.

1. *Dismissal of Servant*—*Member of Municipal Fire Brigade*—*Action against Municipal Corporation for Wrongful Dismissal*—*Justification*—*Immoral Conduct*—*Boasting of*—*Justification of Dismissal on Ground not As-*

**MASR. AND SVT.**—(*Continued.*) *signed.*]—The plaintiff was dismissed from his employment as a member of the fire brigade of the defendant corporation, because, being a married man, not living with his wife, he had living with him the wife of another man, and refused, on being threatened with dismissal if he continued to have her in the house, to banish her from it :—*Held*, that the conduct of the plaintiff was such as to justify his dismissal.—*Held*, also, that his dismissal might be justified for a cause not assigned and not known to his employer at the time of dismissal ; and his boasting to his comrades in the brigade of having illicit relations with his neighbour's wife was another good ground for his dismissal. *McPherson v. City of Toronto*, 326.

2. *Injury to Farm Labourer*—*Defective Condition of Appliances*—*Findings of Jury*—*Negligence*—*Contributory Negligence*—*Judge's Charge*—*Nondirection*—*Duty of Master*—*Employment of Competent Workmen*—*Independent Contractor*—*Objections not Raised at Trial, Urged upon Appeal*—*Costs*—*Damages*—*Prejudice.*]—The plaintiff was employed by the defendant as a farm labourer, and was, in the course of his employment, on the top of a silo. A plank which had been placed there by B., who had previously worked for the defendant, slipped when the plaintiff was upon it, and the plaintiff fell to the ground and was

**MASR. AND SVT.**—(*Continued.*) injured. In an action to recover damages for the injuries, the jury found that the defendant was guilty of negligence which caused the accident, that the negligence consisted in not having the plank properly secured, and that the plaintiff was not guilty of any negligence which caused or contributed to the accident:—*Held*, that the question whether the defendant did all that should be expected from a reasonably careful and prudent employer of labour to avoid the danger, or to discover the danger and remedy it, was not fully and adequately placed before the jury by the trial Judge in his charge; and there should be a new trial (*HODGINS, J.A.*, dissenting on the ground that where the jury by their answer define the negligent act the Court is bound to decide whether it amounts to negligence in law, and it is not necessary that the jury should have been fully instructed upon the law of negligence.)—The duty which a master owes to his servants, with regard to the place in which and the appliances with which they are called upon to do their work, considered, with references to authorities.—*Junor v. International Hotel Co. Limited* (1914), 32 O.L.R. 399, 408, 409, specially referred to.—*Held*, also, that, although the defendant did not, at the trial, object to the charge or ask the Judge to direct the attention of the jury to the defence that the defendant, having employed competent

**MASR. AND SVT.**—(*Continued.*) workmen, and being himself innocent of any neglect or default, was relieved from responsibility, he should not be debarred from objecting and urging this defence upon the appeal; but he should not be allowed the costs of the appeal against the plaintiff. *Goodwin v. Taylor*, 141.

See COMPANY, 2—MUNICIPAL CORPORATIONS, 4—NEGLIGENCE, 1, 3—WORKMEN'S COMPENSATION ACT.

### MASTER IN CHAMBERS.

See COSTS, 2.

### MECHANICS' LIENS.

See CONSTITUTIONAL LAW, 2.

### MINES AND MINERALS.

*Mining Claim — Discovery of Minerals—Lands withdrawn from Exploration—Order in Council.*]—The lands under the waters of Cobalt Lake having been by order in council of the 14th August, 1905, withdrawn from exploration for mines and minerals and from sale, lease, or location, it was *held*, that the plaintiffs had failed to establish their title to a mining claim based upon a discovery of minerals said to have been made upon those lands on the 7th March, 1906.—The judgment of the Court of Appeal, 18 O.L.R. 275, affirmed. *Florence Mining Co. Limited v. Cobalt Lake Mining Co. Limited*, 474.

### MISFEASANCE.

See HIGHWAY, 1.



**MISREPRESENTATION.**

See CHOSE IN ACTION—COMPANY, 1, 3—CONTRACT, 3—SALE OF GOODS, 1.

**MONEY LENT.**

See COMPANY, 1—CONTRACT, 3, 6.

**MORAL OBLIGATION.**

See CONTRACT, 2.

**MORTGAGE.**

1. *Action by Mortgagee for Recovery of Mortgage-moneys and for Possession—Proceedings under Power of Sale—Mortgages Act, sec. 29.*—A mortgagee of lands, who has brought an action to recover the mortgage-moneys, and for possession of the mortgaged lands until paid, is not thereby prevented from taking proceedings under a power of sale contained in the mortgage-deed.—Section 29 of the Mortgages Act, R.S.O. 1914, ch. 112, has no application to such a case.—*Stevens v. Theatres Limited*, [1903] 1 Ch. 857, distinguished. *Shields v. Shields*, 111.

2. *Claim of Mortgagee to Fixtures in Store Erected on Land—Attornment Clause—Relation of Landlord and Tenant—Right to Remove Tenant's Fixtures—Mortgagor and Mortgagee—What is Included in "Fixtures"—Intention.*—The plaintiff was the mortgagee of land upon which was a store containing articles usually regarded as trade-fixtures. The mortgagor sold and conveyed the land to W.; he also sold his stock of merchandise, chattels, and fixtures to W., and executed a bill

**MORTGAGE—(Continued.)**

of sale thereof. W. made a bill of the same property to B., and B. to the defendant F. In this action the plaintiff sought to restrain the defendants from removing such of the articles as he considered to form part of the freehold. The plaintiff's mortgage contained a clause by which the mortgagor attorned to the mortgagee and became tenant of the land at a rent equivalent to and payable at the same time as the interest:—*Held*, that by the mortgage all fixtures passed to the mortgagee, subject to the right to redeem; and, if the clause created the relationship of landlord and tenant, the fixtures were the landlord's and could not be removed by the tenant.—But the true relationship was that of mortgagee and mortgagor; and the mortgagor by the mortgage of the land pledged all that could be regarded as fixtures in the widest sense of the term—all things actually fixed, and such things not actually fixed as were intended to form part of the inheritance.—*Monti v. Barnes*, [1901] 1 Q.B. 205, *Southport and West Lancashire Banking Co. v. Thompson* (1887), 37 Ch.D. 64, 70, *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335, and *Bing Kee v. Yick Chong* (1910), 43 Can. S.C.R. 334, followed. *Gordon v. Fraser*, 31.

See VENDOR AND PURCHASER, 2.

**MOTOR VEHICLES.**

See HIGHWAY—NEGLIGENCE, 2.

**MOTOR VEHICLES ACT.**

See HIGHWAY, 2.

**MUNICIPAL CORPORATIONS.**

1. *City Corporation — Services of Accountant Employed by Mayor — Remuneration — Absence of By-law — Contract — Execution — Adoption — Ratification — Benefit of Services.*]—The judgment of MIDDLETON, J., 39 O.L.R. 34, affirmed.—*Held*, that the contract was not an executed one in the sense that the defendants' council, knowing the facts, accepted the result of the plaintiff's labours and ratified the agreement made with the Mayor; the case did not come within the class of cases where a corporation may be bound without a formal contract or by-law; the plaintiff had misconceived the nature of the work which the Mayor requested him to do; and he could not recover.—*Waterous Engine Works Co. v. Town of Palmerston* (1892), 21 S.C.R. 556, followed.—*Pim v. Municipal Council of Ontario* (1855), 9 U.C.C.P. 304, distinguished. *Mackay v. City of Toronto*, 17.

2. *Gift of Money to "Catholic Army Huts"*—*Resolution of City Council — Ultra Vires — Resolution of Council of 1918 — Money Payable in 1919 — Statutory Powers of Council — "Aid to any Charitable Institution"* — *Municipal Act, sec. 398 (5) — "Charity."*]—A resolution of the city council of 1918, authorising payment out of the municipal funds of a sum of money as a gift to a company incorporated, under the

**MUN. CORPS.—(Continued.)**

name of "Catholic Army Huts," for the purpose of erecting, equipping, and conducting huts for Canadian soldiers, to serve as chapels for (Roman) Catholic soldiers and recreation huts for all soldiers and to supply devotional aids for distribution to (Roman) Catholic soldiers, was quashed as *ultra vires* of the council, upon two grounds:—(1) That the council of 1918 had no power to require or authorise the raising of the money and payment of it in 1919.—(2) That no municipal council had power to make such a gift: it was not authorised by sec. 398 (5) of the *Municipal Act, R.S.O. 1914, ch. 192*, nor by any other enactment of the Legislature; and there was no power to make such a gift unless conferred by statute.—Discussion of the meaning of the words "charitable" and "charity." *Re Homan and City of Toronto*, 632.

3. *Plant for Disposal of Sewage — Erection and Operation — Negligence in Operation — Nuisance to Neighbours — Offensive Odours — Special Damage — Statutory Authority — Municipal Act, sec. 398 (7) — Absence of By-law — Non-compliance with secs. 94 and 97 of Public Health Act — Approval of Provincial Board of Health — Compensation under sec. 325 (1) of the Municipal Act — Remedy by Arbitration — Damage Caused by Lawful Exercise of Powers — Recovery in Action along with Damage Caused by Negligence in Operation.*]—If the thing com-

**MUN. CORPS.**—(*Continued.*)

plained of, although an act which would otherwise be actionable, be authorised by statute, no action will lie in respect of it; but, if it be not the very thing authorised by the Legislature, an action will lie.—Review of the authorities.—Section 398 (7) of the Municipal Act, R.S.O. 1914, ch. 192, and sec. 94 of the Public Health Act, R.S.O. 1914, ch. 218, considered.—*Held*, that the defendants, a city corporation, had created a nuisance by the establishment and operation of a sewage plant, causing offensive odours, by which the lands of the plaintiffs in the vicinity were injuriously affected, and by reason of which the plaintiffs and their families suffered in health; that it had not been shewn that a by-law was passed by the defendants' council authorising the installation of the plant; that the work came under the provisions of sec. 94 of the Public Health Act, and it had not been shewn that those provisions had been complied with, nor (*per* HODGINS, J.A.) the provisions of sec. 97; that the damages suffered by the plaintiffs were caused by the defendants' negligence; and that the defendants could not, therefore, rely upon statutory authority justifying the acts complained of.—*Per* CLUTE, J.:—Although sec. 325 (1) of the Municipal Act expressly provides that where land is injuriously affected by the exercise of any of the powers of the corporation under the authority of the Act the corporation shall make due

**MUN. CORPS.**—(*Continued.*)

compensation for the damages necessarily resulting therefrom, and that the amount of compensation *shall* be determined by arbitration, yet where the major part of the damage arises from negligence in the operation of the plant, and it seems impossible to assign any particular portion of the injury to the lawful exercise of the powers given, the plaintiff is not precluded from recovering full compensation in the action which he is compelled to bring in order to seek an adequate remedy. *Fieldhouse v. City of Toronto*, 491.

4. *Work Authorised by Board of Commissioners of Sewage and Public Works—Act respecting the City of Guelph*, 1 Geo. V. ch. 90, sec. 4 (7)—*Use of Explosives—Negligence of Engineer—Injury to Member of Board—Liability of City Corporation—Volenti non Fit Injuria—Common Employment—Volunteer or Trespasser—Absence of Contractual Relation.*—The defendant city corporation was *held* liable to the plaintiff, who was Mayor of the city and *ex officio* a member of the board of commissioners of sewage and public works (constituted by by-law passed under 1 Geo. V. ch. 90, sec. 4 (7)), for the negligence of the city engineer in the carrying out of a work which had been authorised by the board, viz., the blowing out with dynamite of part of a dam in the river which runs through the city. The plaintiff was in the danger-area and was struck



**MUN. CORPS.**—(Continued.)

by a piece of cement from the dam and injured, while he was endeavouring to keep back the crowd of persons who had assembled near the dam. The negligence found to be the cause of the plaintiff's injury consisted in not removing the crowd to a safe distance and in not covering or protecting the place of operation.—Judgment of CLUTE, J., 41 O.L.R. 308, reversed.—The maxim *volenti non fit injuria* has no application where there is not a full appreciation of the risk.—The doctrine of common employment was not applicable, the plaintiff not being an employee of the defendant corporation.—The plaintiff was not a volunteer or a trespasser in any sense.—*Degg v. Midland R. W. Co.* (1887), 1 H. & N. 773, and *Potter v. Faulkner* (1861), 1 B. & S. 800, distinguished.—*Hayward v. Drury Lane Theatre Limited*, [1917] 2 K. B. 899, 906, referred to. *Mahoney v. City of Guelph*, 313.

See HIGHWAY—MASTER AND SERVANT, 1—STREET RAILWAY.

**NAVIGATION.**

See SHIP.

**NEGLIGENCE.**

1. *Carriers—Waggon Delivered on Wharf by Men Employed in Ship and Left in Dangerous Position—Place of Deposit Indicated by Wharfinger—Direction—Responsibility—Master and Servant—Wharf a Public Place or Highway—Child Lawfully on*

**NEGLIGENCE**—(Continued.)

*Wharf Killed by Overturning of Waggon—Trap—Nuisance—Liability of Carriers—Fatal Accidents Act—Reasonable Expectation of Pecuniary Benefit to Parents—Damages.*]—The defendants carried for hire a crated waggon to the place of consignment, and some of the ship's crew, under the direction of the mate, placed it upon the public wharf there, at a spot indicated by the wharfinger, where it stood leaning against a storehouse. A boy of 6 years, the son of the plaintiffs, was, on the following evening, upon the wharf, accompanied by his parents. While at play with other children, he climbed upon the leaning waggon, which fell over on him, and so injured him that he died. The wharf belonged to the Dominion Government, and was under the control of their wharfinger, subject to the regulations contained in an order in council, which provided that no goods should be landed upon the wharf unless by permission of the wharfinger and in such manner and place as he might direct. By the custom of the port, goods from vessels were not handled by the wharfinger, but were landed by the crew under the direction of the wharfinger as to the place of deposit:—*Held*, that the selection by the wharfinger of the place of deposit and the indication of the place did not make the men his servants or make him liable for their negligence.—The accident was caused by leaving

**NEGLIGENCE—(Continued.)**

the leaning crate too nearly in a perpendicular position: the men who so left it were guilty of gross negligence, and thereby created a common nuisance, for which the defendants, their employers, were liable.—The boy was lawfully upon the wharf, which was a public place or highway; the waggon, placed as it was, was a lure to the boy, and, as it turned out, a trap; and the negligence of the defendants' servants was the actual cause of the boy's injury and death.—*Cook v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, followed.—The liability of the defendants did not terminate with the departure of their servants from the premises, but continued so long as the nuisance was not abated, or until the effect of their negligence ended.—There was a reasonable expectation of pecuniary advantage to the plaintiffs in the future from their deceased son; and they were entitled, under the Fatal Accidents Act, to recover damages. *Clement v. Northern Navigation Co. Limited*, 127.

2. *Collision of Electric Car with Automobile Crossing Line of Railway—Dangerous Highway Crossing—Duty of Person about to Cross—Reasonable Care—Failure to "Stop Dead"—Findings of Jury—Negligence of Persons Operating Electric Car—Head-light—Evidence.*—The plaintiff, driving a motor-car, on a dark night, came into collision with an electric car of the defendants, run-

**NEGLIGENCE—(Continued.)**

ning on rails, when attempting to cross the rails at a regular crossing. At the trial of an action for damages for injury to the plaintiff and his car, the jury found that the accident was caused by the negligence of the defendants, in that there was no light on the front of the car at the time of the accident; also, that the plaintiff did not use enough care, and should have stopped dead at a dangerous crossing.—*Held*, that the extent of the care required from a person about to cross in front of an engine or car running on rails, depends entirely on the particular conditions of each case; in each case what is reasonable care is a question to be decided by the jury, according to the facts of the case.—*Grand Trunk R.W. Co. v. McAlpine*, [1913] A.C. 838, *Rex v. Broad*, [1915] A.C. 1110, *Grand Trunk R.W. Co. v. Hainer* (1905), 36 Can. S.C.R. 180, and *Ramsay v. Toronto R.W. Co.* (1913), 30 O.L.R. 127, referred to.—The finding of the jury as to the plaintiff's negligence indicated that they appreciated the circumstances—they might well have thought that looking was not enough, and that, on a dark night, at a dangerous crossing, reasonable care demanded a stop, as listening might be useless if the plaintiff's motor was in motion.—That finding was sufficient to dispose of the case in favour of the defendants. —*Semble*, that the finding of the jury against the defendants, as to the light, was not sustainable

**NEGLIGENCE**—(*Continued.*)  
as a finding of negligence. *Orth v. Hamilton Grimsby and Beamsville Electric R.W. Co.*, 137.

3. *Explosive Found by Boy in Box Left in Highway Unlocked—Injury to Boy—Liability of Employers of Workmen in Charge of Box—Direct Conflict of Evidence as to Presence of Explosive in Box—Findings of Jury—Actual Knowledge of Defendants—Onus—Meaning of Findings—Indefiniteness.*]—The infant plaintiff, a boy of 9 years, was injured by an explosive stick which he said he found in, and took from, a tool-box standing at the side of a street in a city, unlocked. The box belonged to the defendants, and was being used by their workmen, who were digging a trench in the street. The jury, in answer to questions, found: (1) that the infant plaintiff obtained the explosive which injured him from the defendants' box; (2a) that the defendants "may not have known" it was there; (2b) that the defendants ought, by the exercise of reasonable care, to have known that it was there; (3) that the explosive was in the possession of the defendants when the infant plaintiff obtained possession of it; (4) that the defendants were guilty of negligence in their care of the explosive; (5) that the negligence consisted in not locking their tool-box; (6) that the defendants' negligence caused or contributed to the accident; (7) that the infant plaintiff was not guilty of any

**NEGLIGENCE**—(*Continued.*)  
negligence which caused or contributed to the accident:—*Held*, (HODGINS, J.A., dissenting), that judgment was properly entered for the plaintiffs upon the findings. — The main question, whether the boy had obtained the explosive from the defendants' tool-box, was a question for the jury, and their finding could not be disturbed.—Upon findings (2a) and (2b) it was argued that the defendants were entitled to judgment on the ground that they would be liable only in case there was actual knowledge on their part; but it was *held*, that, the jury having found that the explosive was in the defendants' box, the onus was upon them to shew that it had come there in some way for which they were not responsible, and this they had failed to do.—*Per* HODGINS, J.A.:—The verdict was an unsatisfactory one, and the defendants were entitled to a new trial.—Review of the authorities.—*Newberry v. Bristol Tramways and Carriage Co. Limited* (1912), 107 L.T.R. 801, specially referred to. *Gerard v. Ottawa Gas Co.*, 264.

4. *Obstruction or Nuisance in Highway—Telephone Wires Strung too Low—Proximate Cause of Accident Occasioning Death of Person Passing under Wires—Liability of Township Corporation—Contributory Negligence—Evidence—Inferences from Undisputed Testimony—Appeal—Reversal of Findings of Trial Judge.*] — The judgment of CLUTE, J., 41 O.L.R. 375, in



**NEGLIGENCE**—(*Continued.*)

favour of the plaintiffs, in an action for damages for the death of their son, was reversed (MEREDITH, C.J.O., dissenting).—*Held*, by MAGEE and FERGUSON, JJ.A., that, upon the proper inferences to be drawn from the evidence, the plaintiffs had failed to make out that the accident occurred solely by reason of the negligence of the defendants, and without negligence on the part of the deceased.—*Per* HODGINS, J.A.:—There was such a lack of certainty in arriving at the right conclusion as to the proximate cause, that the Court was justified in saying that the plaintiffs had failed to prove negligence in the defendants.—*Per* MEREDITH, C.J.O.:—The finding of the trial Judge that the obstruction caused by the wires was the proximate cause of the accident, was based upon a reasonable inference from the evidence, and should not be reversed. *Magill v. Township of Moore*, 372.

See CONTRACT, 9—HIGHWAY—MASTER AND SERVANT, 2—MUNICIPAL CORPORATIONS, 3, 4—RAILWAY, 2—SHIP—STREET RAILWAY.

**NEW TRIAL.**

See WILL, 2.

**NEWSPAPER.**

See LIBEL.

**NONDIRECTION.**

See MASTER AND SERVANT, 2.

**NONFEASANCE.**

See HIGHWAY, 1.

**NONREPAIR.**

See HIGHWAY.

**NOTICE BEFORE ACTION.**

See LIBEL.

**NOTICE OF MOTION.**

See ONTARIO TEMPERANCE ACT, 1.

**NUISANCE.**

See MUNICIPAL CORPORATIONS, 3—NEGLIGENCE, 1, 4.

**OBSTRUCTION.**

See NEGLIGENCE, 4.

**ONTARIO TEMPERANCE ACT.**

1. *Magistrate's Conviction for Offence against sec. 41—Motion to Quash—Objection not Taken in Notice of Motion—Judicature Act, sec. 63 (2)—Leave to Serve Supplemental Notice—Service after Expiry of 30 Days—Temperance Act, sec. 102 (2)—Amendment of Original Notice—Evidence to Support Conviction—Intoxicating Liquor Found in Defendant's Possession—Presumption—Sec. 88—Onus—Question for Magistrate—Review of Finding—Offence Insufficiently Described in Conviction—Amendment under sec. 101—Presumption from Possession—Secs. 85, 88—Failure to Rebut—Suspicious Circumstances.]—A motion to quash a magistrate's conviction of the defendant for an offence against sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, was based upon the*

## ONT. T. ACT—(Continued.)

ground that there was no evidence to support it; but on the return, another objection, not taken in the notice of motion, was raised. Section 63 (2) of the Judicature Act provides that "the notice shall specify the objections intended to be raised." The defendant was allowed to serve a supplemental notice, the original motion being retained:—*Held*, that the supplemental notice was not a new notice of motion; that a notice of motion to quash was served within the 30 days prescribed by sec. 102 (2) of the Ontario Temperance Act (added by sec. 33 of the Ontario Temperance Amendment Act, 1917, 7 Geo. V. ch. 50); and that it was competent for the Judge before whom the original motion came to permit the defendant to amend his notice so as to specify the particular objection, notwithstanding the lapse of 30 days from the date of the conviction.—The motion was, therefore, entertained upon both grounds taken. — Intoxicating liquor having been found in the defendant's possession, sec. 88 of the principal Act compelled the defendant to prove that he did not commit the offence of having or keeping liquor contrary to the provisions of the Act; whether the evidence which the defendant adduced was sufficient to satisfy this onus was a question for the magistrate; and his finding should not be reviewed.—The conviction was bad as insufficiently describing the offence, but should be amended under

## ONT. T. ACT—(Continued.)

sec. 101 of the Act.—The evidence of the defendant's possession of liquor was undisputed, and the presumption created by secs. 85 and 88 was not rebutted by the evidence—the circumstances attending the defendant's possession being such as to raise a strong case of suspicion against the plaintiff's statement that, when the liquor was found in his possession, he was transporting it from a place in the Province of Quebec where it might lawfully be purchased to places in Ontario where it might lawfully be kept, viz., his own house and the house of a neighbour. *Rex v. Leduc*, 290.

2. *Magistrate's Conviction for Offence against sec. 41 (1) — "Occupant"—Husband and Wife — "Private Dwelling-house" — Sec. 54—Previous Conviction of Wife.*—The "occupant" is the one who has actual use or possession of a thing; and in this case it was *held*, that the defendant, who was the owner of a dwelling-house, in which he lived with his wife, was the occupant; and the house did not, by virtue of sec. 54 of the Ontario Temperance Act, cease to be his "private dwelling-house," within the meaning of sec. 41 (1), because his wife, not being the "occupant," had been convicted of an offence against the Ontario Temperance Act.—Intoxicating liquor having been found in this house, the defendant was convicted by a magistrate of an offence against sec. 41 (1); but the conviction

**ONT. T. ACT—(Continued.)**

was quashed, because that enactment permits him to have or keep liquor in the private dwelling-house in which he resides.—*Rex v. Irish* (1909), 18 O.L.R. 351, *Kavanagh v. Barber* (1891), 12 N.Y. Supp. 603, and *Hamilton v. City of Fond du Lac* (1870), 25 Wis. 496, followed. *Rex v. Con- dola*, 591.

**ONTARIO RAILWAY AND MUNICIPAL BOARD.**

See STREET RAILWAY.

**ORDER IN COUNCIL.**

See MINES AND MINERALS.

**PARENT AND CHILD.**

See CONTRACT, 4.

**PARTIES.**

*Addition of Defendants—Rule 67—Improper Joinder—Distinct Contracts between Different Parties—Service on Added Defendants out of Ontario—Rule 25 (1) (g)—Discretion—Rule 67 (2).*—British publishers of a reprint of English Law Reports issued a prospectus estimating that each set would contain about 150 volumes of about 1,500 pages each. The sets were sold at a fixed price per volume. The plaintiffs made an agreement with the British publishers to take a certain number of sets, at a stipulated price per volume; and made an agreement with the defendants to sell them a certain number of sets, at a named price. This agreement was made on the faith of the prospectus. There was no contract between the

**PARTIES—(Continued.)**

publishers and the defendants. The publishers cut down the number of pages in the volumes, so that when 150 volumes had been issued, the reprint had not been completed, and it was expected that the sets would run to 200 volumes. When the volumes reached 150, the defendants refused to pay for the additional volumes; and, volumes 151-154 having been delivered, the plaintiffs sued the defendants for the price. The defendants pleaded that they had paid the full price and asked for a declaration that they were entitled to the remaining volumes without further payment. An order was made, on the application of the plaintiffs, adding the British publishers as defendants, permitting service to be made upon them in Great Britain, and allowing the plaintiffs to amend their statement of claim.—This order was set aside on appeal, it being held that (the two contracts being quite distinct and between different parties) the added defendants were not proper parties to the action brought against the original defendants (Rule 25 (1) (g)), applying the criterion of Rule 67, relating to the joinder of parties and of causes of action.—*Oesterreichische Export A.G. v. British Indemnity Insurance Co. Limited*, [1914] 2 K.B. 747, distinguished.—The right to allow service out of Ontario is one which must be exercised in accordance with a sound judicial discretion; Rule 67 (2) enables the Court to deal with the case.



**PARTIES—**(*Continued.*)

if the joinder is deemed oppressive or unfair; and no sound principle could justify the bringing in Ontario of an action by foreigners against defendants in Great Britain, upon a contract neither made nor to be performed within Ontario. *Boston Law Book Co. v. Canada Law Book Co. Limited*, 13. (*See ante*, APPEAL.)

*See* WILL, 5.

**PARTNERSHIP.**

*See* COMPANY, 1.

**PASSENGER.**

*See* STREET RAILWAY.

**PASSING ACCOUNTS.**

*See* EXECUTORS AND ADMINISTRATORS.

**PAYMENT.**

*See* COMPANY, 1—CONTRACT, 9, 10.

**PAYMENT INTO COURT.**

*See* VENDOR AND PURCHASER, 2.

**PENALTIES.**

*See* FINES AND PENALTIES.

**PERILS OF NAVIGATION.**

*See* SHIP.

**PERSONAL REPRESENTATIVE.**

*See* WILL, 5.

**PHYSICIAN AND PATIENT.**

*See* CONTRACT, 7.

**POLICE MAGISTRATE.**

*See* ONTARIO TEMPERANCE ACT.

**POWER OF SALE.**

*See* MORTGAGE, 1.

**PRACTICE.**

*See* APPEAL—COMPANY, 1—COSTS—INTEREST — ONTARIO TEMPERANCE ACT, 1—PARTIES—SOLICITOR.

**PREFERENCE.**

*See* ASSIGNMENTS AND PREFERENCES.

**PRESSURE.**

*See* HUSBAND AND WIFE.

**PRESUMPTION.**

*See* CONTRACT, 10—ONTARIO TEMPERANCE ACT, 1—RAILWAY, 2—WILL, 5.

**PRINCIPAL AND SURETY.**

*See* COMPANY, 4.

**PRIVATE WAY.**

*See* WAY.

**PROCURING.**

*See* CRIMINAL LAW.

**PROMISE.**

*See* CONTRACT, 2, 3, 6.

**PROMISSORY NOTES.**

*See* ASSIGNMENTS AND PREFERENCES—CONTRACT, 2.

**PROPERTY PASSING.**

*See* CONTRACT, 9—SALE OF GOODS, 2.

**PROSTITUTE.**

*See* CRIMINAL LAW.

## PROVINCIAL BOARD OF HEALTH.

See MUNICIPAL CORPORATIONS, 3.

## PROVINCIAL LEGISLATURE.

See COMPANY, 3, 4—CONSTITUTIONAL LAW.

## PROXIMATE CAUSE.

See HIGHWAY, 1 — NEGLIGENCE, 4—STREET RAILWAY.

## PUBLIC HEALTH ACT.

See MUNICIPAL CORPORATIONS, 3.

## PUBLIC HIGHWAY.

See HIGHWAY—NEGLIGENCE—RAILWAY, 2.

## PUBLIC PLACE.

See NEGLIGENCE, 1.

## PUBLIC WORKS.

See MUNICIPAL CORPORATIONS, 4.

## RAILWAY.

1. *Carriage of Goods—Receipt for Number of Packages Stated by Shipper—Shortage in Delivery—Effect of Receipt—Primâ Facie Case against Carriers—Evidence to Displace—Preponderating Probability—Burden of Proof.*]—The plaintiff sent a number of packages of goods to the railway station at A., and was allowed to place them in a car. A few minutes before his own departure from A., the plaintiff applied to the defendants' agent there for a shipping bill for the packages in the car. The agent handed him a bill, but did not count

## RAILWAY—(Continued.)

the packages; the bill stated the number of packages, according to the plaintiff's statement, with the addition of "S. L. & C.," which was said to mean "shipper's load and count." The car was immediately sealed by the agent, with the packages uncounted. In due course the car arrived at T., accompanied by its way-bill, and when it arrived it had not been tampered with. It was unloaded by a checker, and it was found that there were four packages short of what were called for in the way-bill. The plaintiff was advised of the arrival of the car; he paid the freight, and delivery was made, the delivery-notice being marked "four pieces short." This was based upon the documents and the count made by the checker:—*Held*, that, as regarded the plaintiff, no effect could be given to the placing of "S. L. & C." upon the shipping bill, nor to the explanation given to him by the agent, that, there being no opportunity to count, his count would have to be accepted.—*Held*, also, that, while the shipping bill was a receipt for the goods, it was not conclusive, and might be controverted by evidence shewing that the goods were not received: the agent had no authority to make a contract of carriage binding on the defendants, save in respect of goods actually received by him; the receipt was *primâ facie* evidence, and it was upon the defendants to explain it away.—

**RAILWAY—(Continued.)**

*Leduc v. Ward* (1888), 20 Q.B.D. 475, 479, and *Smith & Co. v. Bedouin Steam Navigation Co. Limited*, [1896] A.C. 70, applied and followed.—And *held*, upon the evidence—weighing the preponderating probability, having regard to the burden of proof—that the defendants had delivered to the plaintiff all the goods that they actually received from him. *Nathanson v. Grand Trunk R.W. Co.*, 73.

2. *Injury to and Death of Person Crossing Track—Foot Caught in “Split-switch” — Negligence—Maintenance of Split-switch at Highway Crossing—Findings of Jury—Evidence—Inference as to Cause of Death — Contributory Negligence—Statutory Authorisation of Switch — Approval by Board of Railway Commissioners — Failure to Shew—Railway Act, R.S.C. 1906, ch. 37, sec. 238 (8 & 9 Edw. VII. ch. 32, sec. 5)—Presumption—Function of Jury — Jurisdiction of Board—Rights of Railway Company in Respect of Highway—Negligent and Excessive Exercise of Powers—Establishment of Public Highway.]—At about 10 o'clock at night on a day in April, 1915, D. was found lying beside the tracks of the defendants at a place where the tracks were crossed by Q. street, in the town of P., “with practically both thighs amputated above the knee and one foot tightly caught in the frog or switch.” D. died shortly afterwards, and this action was brought by the administrator of*

**RAILWAY—(Continued.)**

his estate to recover damages for his death. The switch was of the kind known as a “split-switch.” At the trial, the jury, in answer to questions, found that the death was caused by the defendants’ negligence, which, they said, consisted in having a split-switch on the public highway; and they found against contributory negligence:—*Held*, upon the evidence, that the Dominion Board of Railway Commissioners had not approved of the placing of the split-switch at the crossing; and the defendants were not relieved or otherwise assisted by the provisions of sec. 238 of the Railway Act, enacted by 8 & 9 Edw. VII. ch. 32, sec. 5, merely because no complaint or application had been made to the Board under that section—it was not to be presumed that, because the Board had not been put in motion, approval of the switch had been given.—*Held*, also, upon the evidence, that Q. street was a public highway.—*Held*, also, that the inference could properly be drawn by the jury that the construction and maintenance of the switch on the highway was a source of danger to those having the right to pass over the street; that there was, therefore, evidence of negligence to go to the jury; and that the jury, in basing their conclusion on a consideration of that evidence, were not usurping the jurisdiction of the Board.—Not only must an authorised act be done in a reasonable way and



**RAILWAY—(Continued.)**

without negligence, but there is the additional obligation upon one exercising a statutory or authorised power, not to exceed that power. Whatever were the rights which the defendants acquired in respect to the high-way, they did not include the erection and maintenance thereon of the split-switch.—*Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works*, [1898] 2 Ch. 603, 611, *Roberts v. Charing Cross Euston and Hampstead R.W. Co.* (1903), 87 L.T.R. 732, 733, 734, and *Moore v. Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462, 465, referred to. *Brunelle v. Grand Trunk R.W. Co.*, 220.

See CONSTITUTIONAL LAW, 2—  
NEGLIGENCE, 2—STREET RAIL-  
WAY.

**RATIFICATION.**

See MUNICIPAL CORPORATIONS, 1.

**RECEIPT.**

See RAILWAY, 1.

**REFERENCE.**

See COSTS, 2—TRUSTS AND TRUSTEES.

**RELEASE.**

See CONTRACT, 1—DURESS.

**REMISSION OF PENALTIES.**

See FINES AND PENALTIES.

**REPUDIATION.**

See CONTRACT, 8.

**RESCISSION OF CONTRACT.**

See CHOSE IN ACTION—CONTRACT, 3, 8—SALE OF GOODS, 2.

**RESERVATION.**

See WAY, 2.

**RESOLUTION.**

See MUNICIPAL CORPORATIONS, 2.

**RIGHT OF WAY.**

See WAY.

**ROMAN CATHOLIC SEPARATE SCHOOLS.**

See CONSTITUTIONAL LAW, 1.

**ROYAL PREROGATIVE.**

See COMPANY, 3.

**RULES.**

(Consolidated Rules of the Supreme Court of Ontario, 1913.)

Rule 25 (1) (g).]—See PARTIES.

Rule 67.]—See PARTIES.

Rule 507 (2).]—See APPEAL.

**SALE OF GOODS.**

1. *Action for Price—Counterclaim for Damages for Fraudulent Misrepresentation as to Value of Goods—Failure to Establish Fraud—Warranty as to Quantity—Affirmation at Time of Sale not Intended as Warranty—Construction of Contract—Sale or Bailment—Judgment of Trial Judge—Appeal by Defendants—No Appeal by Plaintiff—“Judgment not Judicial”—“Equitable on Facts.”*—The plaintiff sued for \$760, the balance of the price of a quantity of junk sold by him to the defendants for

**SALE OF GOODS—(Continued.)**  
 \$1,500. The defendants alleged that the plaintiff falsely and fraudulently represented the junk as worth \$2,000 or at least \$1,800, and that, induced by this representation, they executed the agreement of purchase; that they sold all the junk but a small quantity, and realised only \$800; and they counterclaimed \$2,000 damages. The junk was not sold by description or sample; it was inspected by the defendants. The trial Judge found that the representation was made and that the defendants acted upon the faith of it, but did not find that it was fraudulent; he gave judgment for the plaintiff for \$200 and dismissed the counterclaim. The defendants appealed; the plaintiff did not appeal:—*Held*, upon the evidence, that the defendants had failed to establish fraud.—*Held*, also, that while an affirmation at the time of the sale is a warranty, provided it appears on evidence to be so intended—which intention is to be deduced from the whole of the evidence—and there may be a warranty as to quantity—the evidence in this case did not shew that the representation made was intended to be contractual respecting the accuracy of the statement; it was in fact nothing more than the opinion or estimate or belief of the vendor, the plaintiff.—*Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394, *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30, and *Chanter v. Hopkins* (1838), 4 M. & W.

**SALE OF GOODS—(Continued.)**  
 399, followed.—There being no fraud and no warranty, the plaintiff was entitled to recover the balance of the purchase-price; but, as he had not appealed from the judgment for \$200, that judgment must stand.—Remarks on the course adopted by the trial Judge in giving a “judgment not judicial” but “equitable on the facts.” *Gardner v. Merker*, 411.

2. *Contract for Sale of Motor-truck—Knowledge of Vendor of Purpose for which Truck Intended—Article Delivered not Reasonably Fit for Purpose—Finding of Trial Judge on Evidence—Truck Sold by Manufacturer as of his own Manufacture—Truck actually Manufactured by another—Implied Warranty—Property not Passing till Payment in Full—Right of Purchaser to Rescind Contract, Payment in Full not having been Made.*—The plaintiffs bought from the defendants, a manufacturing company, a motor-truck for use in the plaintiffs’ business of carriers. The defendants were informed of the purpose for which the truck was required and the character of the work it would be put to, and they knew the character of the highways upon which it was to be used. The contract was in writing. The truck was described in the writing as a “Sawyer-Massey motor-truck.” The price was \$5,600, \$1,000 of which was paid in cash; the balance was payable by instalments, for which the plaintiffs gave promis-

**SALE OF GOODS—(Continued.)**

sory notes. Each note, in addition to identifying the contract of sale and the subject-matter, provided that "the article for which this note is given shall remain the property of Sawyer-Massey Co. Limited until all notes or renewals given in settlement are paid in full:"—*Held*, in an action for rescission of the contract, that the defendants must be regarded as having undertaken to furnish a truck suitable for the plaintiffs' purposes.—*Bristol Tramways etc. Carriage Co. Limited v. Fiat Motors Limited*, [1910] 2 K.B. 831, *Canadian Gas Power and Launches Limited v. Orr Brothers Limited* (1911), 23 O.L.R. 616, and *Alabastine Co. of Paris Limited v. Canada Producer and Gas Engine Co. Limited* (1914), 30 O.L.R. 394, followed.—And *held*, upon the evidence, that the truck was not, at the time of delivery, or afterwards at any time, reasonably fit for the purpose for which it was intended.—It appeared in evidence that the truck sold was not manufactured by the defendants, but was built for them by another company, and sold under the "Sawyer-Massey" name:—*Held*, that, in the absence from the contract of specific words to the contrary, there is an implied warranty, in the nature of a condition or undertaking, where the vendor is a manufacturer, that the goods are of his manufacture.—*Johnson v. Raylton* (1881), 7 Q.B.D. 438, followed.—And *held*, that there was a breach of

**SALE OF GOODS—(Continued.)**

this warranty or condition, the truck not being in any proper sense a "Sawyer-Massey motor-truck." *Randall v. Sawyer-Massey Co. Limited*, 602.

See CONTRACT, 5, 8, 9—COSTS, 1.

**SALE OF LAND.**

See CHOSE IN ACTION—COMPANY, 3—CONTRACT, 7—VENDOR AND PURCHASER.

**SALE OF PROPERTY.**

See WILL, 4.

**SCHOOLS.**

See CONSTITUTIONAL LAW, 1.

**SECRETARY OF COMPANY.**

See FINES AND PENALTIES.

**SECURITY.**

See HUSBAND AND WIFE — VENDOR AND PURCHASER, 2—WILL, 4.

**SECURITY FOR COSTS.**

See COSTS, 2.

**SEPARATE SCHOOLS.**

See CONSTITUTIONAL LAW, 1.

**SERVANT.**

See COMPANY, 2—MASTER AND SERVANT.

**SERVICE OF PROCESS OUT OF THE JURISDICTION.**

See PARTIES.

**SERVICES.**

See CONTRACT, 10—MUNICIPAL CORPORATIONS, 1 — SOLICITOR.



**SET-OFF.**

See CONTRACT, 10.

**SETTLED ACCOUNT.**

See EXECUTORS AND ADMINISTRATORS.

**SEWAGE.**

See MUNICIPAL CORPORATIONS, 3.

**SHARES AND SHARE-HOLDERS.**

See COMPANY, 1—CONTRACT, 1, 3.

**SHIP.**

*Carriage of Grain—Damage by Water—Hole Made in Side of Ship—Evidence as to Cause of Hole—“Seaworthiness”—“Due Diligence”—Negligence—Perils of Navigation—Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61, secs. 6 and 7 (D.)—Findings of Trial Judge—Appeal.]—Grain shipped by the plaintiffs in the defendants’ barge was damaged by water:—Held (FERGUSON, J.A., dissenting), that the damage was caused by the unseaworthiness of the barge, and the defendants were liable.—Sections 6 and 7 of the Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61 (D.), considered.—Lennard’s Carrying Co. Limited v. Asiatic Petroleum Co. Limited, [1915] A.C. 705, and Virginia Caroline Chemical Co. v. Norfolk and North American Steam Shipping Co., [1912] 1 K.B. 229, 243, 244, applied. Grain Growers Export Co. v. Canada Steamship Lines Limited, 330.*

See NEGLIGENCE, 1.

**SOLICITOR.**

*Bill of Costs—Action to Recover Amount of—Solicitors Act, R.S.O. 1914, ch. 159, sec. 34—Services Rendered by Plaintiff in Capacity of Solicitor—Lump-sum Charged for Specific Items of Services—Non-compliance with Statute in Part of Bill only—Effect as to Whole—No Proper Bill Delivered—Action Prematurely Brought.]—The plaintiff, a barrister and solicitor, sued the defendants for the amount of a bill for services rendered. In the bill the services rendered by the plaintiff in his capacity of counsel were distinctly charged for; the bill also contained many items in respect of each of which a specific charge was made; and, in addition, certain items, Nos. 1 to 16, in respect of none of which a specific charge was made, but at the end of the bill there appeared the following: “Fee on negotiations as above set out and recovering property of the value of \$60,000 subject to a payment of \$30,000. . . . \$700:”—Held, that although the services charged for, other than those rendered as counsel, might have been rendered by a barrister or a lay agent as well as by a solicitor, and none of them were services which were necessarily performed by a solicitor, the employment was referable to the plaintiff’s character as a solicitor, and his claim in the action was subject to the provisions of the Solicitors Act, R.S.O. 1914, ch. 159.—Re McBrady and O’Connor (1899), 19 P.R. 37, 43, followed.—Held, also, that the bill rendered did not, in respect of the*

**SOLICITOR—(Continued.)**

16 items, comply with the provisions of sec. 34 of the Act; a bill upon which an action could be based had not been delivered; and the action was therefore prematurely brought.—*Gould v. Ferguson* (1913), 29 O.L.R. 161, and *Re Solicitor* (1917), 12 O.W.N. 191, followed. *Lynch-Staunton v. Somerville*, 282.

See WILL, 5.

**SPECIAL DAMAGE.**

See MUNICIPAL CORPORATIONS, 3.

**SPECIFICATIONS.**

See CONTRACT, 8.

**SPECIFIC PERFORMANCE.**

See COMPANY, 3—VENDOR AND PURCHASER, 1.

**STATUTE OF FRAUDS.**

See COMPANY, 3—CONTRACT, 5, 8.

**STATUTE OF LIMITATIONS.**

See EXECUTORS AND ADMINISTRATORS — LIMITATION OF ACTIONS.

**STATUTES.**

30 & 31 Vict. ch. 3, sec. 93 (Imp.) (British North America Act).

See CONSTITUTIONAL LAW, 1.

53 Vict. ch. 31, sec. 2 (*d.*) (D.) (Bank Act).

See CONTRACT, 9.

R.S.O. 1897, ch. 223, sec. 2 (8) (Municipal Act).

See WAY, 1.

R.S.O. 1897, ch. 224, secs. 7, 149 (Assessment Act).

See WAY, 1.

R.S.O. 1897, ch. 267 (Act to preserve the Forests from Destruction by Fire).

See CONTRACT, 9.

**STATUTES—(Continued.)**

R.S.C. 1906, ch. 37, sec. 238 (Railway Act).

See RAILWAY, 2.

R.S.C. 1906, ch. 79, sec. 29 (2) (Companies Act).

See COMPANY, 1.

R.S.C. 1906, ch. 146, sec. 216 (1) (*a*) (Criminal Code).

See CRIMINAL LAW.

8 & 9 Edw. VII. ch. 32, sec. 5 (D.) (Amending Railway Act).

See RAILWAY, 2.

9 & 10 Edw. VII. ch. 61, secs. 6, 7 (Water-Carriage of Goods Act).

See SHIP.

1 Geo. V. ch. 90, sec. 4 (7) (O.) (Act respecting the City of Guelph).

See MUNICIPAL CORPORATIONS, 4.

2 Geo. V. ch. 31, sec. 134 (O.) (Companies Act).

See FINES AND PENALTIES.

3 & 4 Geo. V. ch. 13, sec. 9 (D.) (Amending Criminal Code).

See CRIMINAL LAW.

4 Geo. V. ch. 25, sec. 60 (1) (O.) (Workmen's Compensation Act).

See WORKMEN'S COMPENSATION ACT.

R.S.O. 1914, ch. 56, secs. 24 and 74 (1) (Judicature Act).

See COSTS, 1.

R.S.O. 1914, ch. 56, secs. 35 (4), 60, 61.

See INTEREST.

R.S.O. 1914, ch. 56, sec. 63 (2).

See ONTARIO TEMPERANCE ACT, 1.

R.S.O. 1914, ch. 71, sec. 8 (1) (Libel and Slander Act).

See LIBEL.

R.S.O. 1914, ch. 75, secs. 5, 6 (4) (Limitations Act).

See LIMITATION OF ACTIONS.

R.S.O. 1914, ch. 75, secs. 46, 47, 48.

See EXECUTORS AND ADMINISTRATORS.

R.S.O. 1914, ch. 102 (Statute of Frauds).

See COMPANY, 3—CONTRACT, 5, 8.

R.S.O. 1914, ch. 112, secs. 2 (*d.*), 6 (Mortgages Act).

See VENDOR AND PURCHASER, 2.

R.S.O. 1914, ch. 112, sec. 29.

See MORTGAGE, 1.

R.S.O. 1914, ch. 121, sec. 67 (Trustee Act).

See TRUSTS AND TRUSTEES.

R.S.O. 1914, ch. 140, secs. 33, 49 (Mechanics and Wage-Earners Lien Act).

See CONSTITUTIONAL LAW, 2.

R.S.O. 1914, ch. 151 (Fatal Accidents Act).

See NEGLIGENCE, 1.

**STATUTES—(Continued.)**

R.S.O. 1914, ch. 159, sec. 34 (Solicitors Act).

See SOLICITOR.

R.S.O. 1914, ch. 178, sec. 98 (1) (Companies Act).

See COMPANY, 2.

R.S.O. 1914, ch. 179, secs. 6, 7 (1), 12, 16 (Extra Provincial Corporations Act).

See COMPANY, 3.

R.S.O. 1914, ch. 183, secs. 156 (1), (3), 193 (1), 194 (condition 8) (Insurance Act).

See INSURANCE, 2.

R.S.O. 1914, ch. 183, secs. 156, 172 (1).

See INSURANCE, 1.

R.S.O. 1914, ch. 183, sec. 171 (5).

See INSURANCE, 3.

R.S.O. 1914, ch. 184 (Loan and Trust Corporations Act).

See COMPANY, 4.

R.S.O. 1914, ch. 192, secs. 325 (1), 398 (7) (Municipal Act).

See MUNICIPAL CORPORATIONS, 3.

R.S.O. 1914, ch. 192, sec. 398 (5).

See MUNICIPAL CORPORATIONS, 2.

R.S.O. 1914, ch. 192, sec. 460.

See HIGHWAY, 1.

R.S.O. 1914, ch. 207, sec. 13 (Motor Vehicles Act).

See HIGHWAY, 2.

R.S.O. 1914, ch. 218, secs. 94, 97 (Public Health Act).

See MUNICIPAL CORPORATIONS, 3.

5 Geo. V. ch. 45 (O.) (Ottawa Separate Schools).

See CONSTITUTIONAL LAW, 1.

6 Geo. V. ch. 30, sec. 1 (O.) (Amending Mechanics and Wage-Earners Lien Act).

See CONSTITUTIONAL LAW, 2.

6 Geo. V. ch. 50, secs. 41 (1), 54 (O.) (Ontario Temperance Act).

See ONTARIO TEMPERANCE ACT, 2.

6 Geo. V. ch. 50, secs. 41, 85, 88, 101, 102 (2) (O.)

See ONTARIO TEMPERANCE ACT, 1.

7 Geo. V. ch. 50, sec. 33 (O.) (Ontario Temperance Amendment Act, 1917).

See ONTARIO TEMPERANCE ACT, 1.

7 Geo. V. ch. 60 (O.) (Ottawa Separate Schools).

See CONSTITUTIONAL LAW, 1.

**STIFLING PROSECUTION.**

See HUSBAND AND WIFE.

**STOCK EXCHANGE.**

See CONTRACT, 1.

**STREET RAILWAY.**

*Injury to Passenger Alighting from Street-car — Negligence — Trial — Finding of Jury — Explanation—Reconsideration—Substituted Finding—Acceptance by Trial Judge—Dangerous Place to Alight—Step of Car too Far from Ground—Order of Ontario Railway and Municipal Board—Non-compliance with—Platform Placed on Highway by City Corporation—Duty of Company — Neglect — Proximate Cause of Injury.]*—In an action for damages for injury sustained by a woman in alighting from a closed double truck street-car of the defendants, upon a city highway, the jury, in answer to questions, found: (1) that the accident was caused by the negligence of the defendants; (2) that the negligence consisted in not furnishing proper platform accommodation for the purpose of getting on and off the defendants' cars; and (3) no contributory negligence. After a discussion between the trial Judge and the jurors in regard to the second finding, the trial Judge sent the jury back to reconsider that finding. When the jury returned, they stated that for the second finding they had substituted the following: "We find that the north end of the car-step was sufficiently shot past the north end of the platform to render it positively dangerous to passengers alighting. We also find that the height of the car-steps did not comply with the regulations of the Ontario Railway and Municipal Board, and that these cir-



**ST. RAILWAY—(Continued.)**

cumstances caused the accident:”—*Held*, that the trial Judge properly accepted and acted upon the substituted answer to question 2.—*Townsend's Auto Livery v. Thornton* (1917), 13 O.W.N. 237, followed.—By order of the Board, which had the force of a statute, it was directed that on closed double truck cars the height of the first step above the ground should be not less than 14 inches nor more than 16 inches. Upon the car from which the plaintiff alighted, the step was 21 inches above the platform at which the car purported to stop and 33 inches above the ground at the place where the car overshot the platform and where the plaintiff alighted. It appeared that the platform had been erected and the stopping place fixed by the city corporation:—*Held*, that, by force of the statute under which the defendants operated and the order of the Board, it was the duty of the defendants to see that the proper facilities for passengers to alight were provided—not a platform, but a step upon the car of the prescribed distance above the ground; they did not provide such a step; the place was dangerous; and, the jury having found the danger and the neglect to provide the step, and that these were the proximate cause of the accident, judgment was properly entered for the plaintiffs.—The question whether the order was unreasonable or impossible to comply with was not

**ST. RAILWAY—(Continued.)**

open. *Dowson v. Toronto and York Radial R.W. Co.*, 158.

See NEGLIGENCE, 2.

**STYLE OF CAUSE.**

See COMPANY, 1—COSTS, 2.

**SUBROGATION.**

See COMPANY, 4.

**SURETY.**

See COMPANY, 4.

**SURROGATE COURTS.**

See EXECUTORS AND ADMINISTRATORS—TRUSTS AND TRUSTEES.

**SURVIVORSHIP.**

See CONTRACT, 4.

**TAX SALE.**

See WAY, 1.

**TELEPHONE WIRES.**

See NEGLIGENCE, 4.

**TESTAMENTARY CAPACITY.**

See WILL, 3, 5.

**TIMBER.**

See LIMITATION OF ACTIONS.

**TIME.**

See ONTARIO TEMPERANCE ACT, 1.

**TITLE TO LAND.**

See VENDOR AND PURCHASER, 1.

**TRAFFIC.**

See HIGHWAY.

**TRESPASSER.**

See MUNICIPAL CORPORATIONS, 4.

**TRIAL.**

See CONSTITUTIONAL LAW, 2—  
MASTER AND SERVANT, 2.

**TRUST COMPANY.**

See COMPANY, 4.

**TRUSTS AND TRUSTEES.**

*Compensation of Trustees — Trustee Act, sec. 67—Reference, Scope of—Scale of Allowance Fixed by Surrogate Court in Respect of other Parts of Estate—Diligence and Capacity of Trustees — Reasonable Allowance — Minimising of Responsibility — Percentage on Taking over and Distributing Estate — Value of Work Done—Value of Estate—Arbitrary Sum Allowed where Estate Large and Duties of Trustees Simple.*]—A reference was directed to the Master to fix the compensation to be allowed to trustees under a marriage settlement for their care, pains, trouble, and time expended in and about realising, managing, administering, disposing of, and settling the affairs of the trust, in so far as the same related to the portion of the trust represented in a certain mortgage for \$260,000, made to the trustees to secure a part of the purchase-money of land included in the trust which was sold by the trustees, including the transfer of the mortgage to the Accountant of the Court, for which the trustees had not been compensated: see *Re Hughes*, (1918), 42 O.L.R. 345. Compensation for the services of the trustees had previously been fixed by the Judges of a Surrogate Court in respect of the

**TRUSTS & TSTEES.**—(*Contd.*) whole of the estate with the exception of this mortgage:—*Held*, that the Master rightly treated the order of reference as requiring him to ascertain what compensation ought to be allowed to the trustees for their services in connection with this portion of the estate from the time of their appointment down to and including the transfer of the mortgage to the Accountant.—(2) That the Master was not bound by what had been decided by the Surrogate Judges as to the scale upon which compensation should be fixed.—(3) That, upon the evidence, the trustees acted as careful, diligent, and competent trustees would be expected to act; the imputation of want of capacity on their part was without foundation; and the compensation ought to be upon the footing of what an ordinarily careful and competent trustee is entitled to receive.—(4) That the trustees from time to time consulted their *cestuis que trust* as to questions presenting themselves for determination, and made applications for the advice of the Court, thus abstaining from taking unnecessary risks, did not afford ground for cutting down the amount of compensation.—(5) *Semble*, that what the trustees had done was sufficient to justify the allowance of a percentage on taking over and distributing the estate—the word “distribute” as used in *Re Farmers’ Loan and Savings Co.* (1904), 3 O.W.R. 837, and *Re McIntyre, McIntyre v. London*

**TRUSTS & TSTEEES.**—(Contd.)  
*and Western Trusts Co.* (1904), 7 O.L.R. 548, is intended to convey the same idea as the expressions used in *Re Berkeley's Trusts* (1879), 8 P.R. 193.—(6) The calculation of percentages upon the various parts of the estate and upon the receipts and disbursement of income is one of the means adopted of fixing a trustee's compensation; but neither the trustee nor the *cestui que trust* has the right to insist upon its adoption; the tribunal before which the matter comes has to ascertain as best it may what is a fair and reasonable allowance for the trustee's care, pains, and trouble, and his time expended in and about the estate (sec. 67 of the Trustee Act, R.S.O. 1914, ch. 121); the tribunal cannot be expected to ascertain, weigh, and set a value upon the actual work properly done, and allow such value and no more; regard must be had to the size of the estate.—*Re Fleming* (1886), 11 P.R. 272, 278, 426, and *Re Toronto General Trusts Corporation and Central Ontario R.W. Co.* (1905), 6 O.W.R. 350, followed.—(7) An allowance of 3 per cent. upon the \$260,000 and 5 per cent. upon the income derived during the period dealt with upon the reference would be unreasonable in the circumstances; the fixing of any sum is more or less arbitrary; and in this case the sum of \$4,000 should be fixed, in addition to what was allowed in the Surrogate Court, as a sufficient recognition of the faithful administration of a trust of consider-

**TRUSTS & TSTEEES.**—(Contd.)  
 able magnitude, but of comparative simplicity, and no more than reasonable *cestuis que trust* ought to be content to pay. *Re Hughes*, 594.

See ASSIGNMENTS AND PREFERENCES—EXECUTORS AND ADMINISTRATORS.

### ULTRA VIRES.

See COMPANY, 1, 3—CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS, 2.

### UNDERTAKING.

See CONTRACT, 3, 6.

### UNDUE INFLUENCE.

See HUSBAND AND WIFE—WILL, 3, 5.

### VENDOR AND PURCHASER.

1. *Agreement for Sale of Land—Inability of Purchaser to Make Title to Small Portion—Materiality—Specific Performance with Compensation—Application of Rule—Compensation, how to be Fixed—Resale by Vendor—Attempt to Forfeit Sale-deposit—Action by Purchaser to Recover—Provision in Agreement for Return of Deposit.*—The plaintiff agreed to buy from the defendant and the defendant to sell to the plaintiff a dwelling-house with grounds and outbuildings, for \$32,000. The plaintiff, upon the execution of the agreement, paid the defendant \$3,000 as a sale-deposit. It turned out that the defendant could not make title to one part of the premises sold—a small but material part,



**VENDOR & PUR.**—(*Continued.*) as was found. The agreement provided that, on any objection to title being taken which the vendor should be unable or unwilling to remove, the agreement should be null and void and the cash-payment should be returned without interest. There was not on the part of either party, after the defect in title had been discovered, an offer of specific performance with compensation and a submission to an authoritative ascertainment of the proper compensation—and the plaintiff and defendant were wide apart in their conceptions of what a proper sum for compensation would be. Almost immediately after the day fixed for closing, the defendant resold the land to a stranger, for \$30,000, the contract providing that the vendor should not be called upon to make title to the small part. The plaintiff thereupon sued to recover his \$3,000, which the defendant sought to retain:—*Held*, that the defendant could not rescind the contract and forfeit the sale-deposit when he had not title to the property to be conveyed. — Discussion of the equitable doctrine of specific performance with compensation, and review of the authorities.—And *held*, that the defendant could not invoke the equitable doctrine at all, because, by the resale of the land, he had put it out of his power to resort to equity—he could not now give specific performance even with compensation.—If the equitable doctrine were applicable, the defendant was

**VENDOR & PUR.**—(*Continued.*) not the one to fix compensation; and he never expressed his readiness to submit to specific performance subject to such compensation as might be deemed just.—*Held*, also, that, when the agreement itself provides for what is to happen upon certain events, it alone is to be resorted to; there cannot be any recourse either to law or equity for any other remedy.—*Ashton v. Wood* (1857), 3 Jur. N.S. 1164, followed.—And here, according to the terms of the agreement, in the event which had happened, the cash-payment was to be returned. *Bowes v. Vaux*, 521.

2. *Agreement for Sale of Land—Purchase-money Payable in Instalments—Destruction by Fire of Buildings on Land—Application of Insurance Money—Instalments not yet Due—Vendor's Lien—"Mortgage"—Mortgages Act, R.S.O. 1914, ch. 112, secs. 2 (d), 6—Security for Future Instalments—Payment into Court.*] — The plaintiffs agreed to sell, to the assignors of the defendant, land upon which there were buildings. The purchase-money was payable by instalments; and a large part of it was still unpaid when the buildings were damaged by fire. The agreement contained a covenant that the purchasers would insure the buildings in their own names, with loss payable to the vendors as their interest might appear. The defendant insured the building accordingly, and the insurance companies issued cheques

**VENDOR & PUR.—(Continued.)**

for the amount of the loss, payable to the order of the defendant and the plaintiffs:—*Held*, that the plaintiffs, having a vendor's lien, were mortgagees within the meaning of sec. 2 (d) of the Mortgages Act, R.S.O. 1914, ch. 112, and were entitled to have the insurance money applied in accordance with the provisions of sec. 6.—If the plaintiffs were not mortgagees, the same application of the moneys should be made, by virtue of the relationship of vendor and purchaser. — The plaintiffs were entitled to the security of the insurance money, just as, before the fire, they were entitled to the security of the building which the money represented.—The plaintiffs were not entitled to apply the insurance money in payment of instalments not yet due, but only to look to that money as part of their security. — The period during which instalments were to be paid being a long one, the money should not be held in trust and invested; but, if the parties could not agree as to its disposal, should be paid into Court.—*Corham v. Kingston* (1889), 17 O.R. 432, and *Edmonds v. Hamilton Provident and Loan Society* (1881), 18 A.R. 347, followed. *Scott v. Crinnian*, 430.

See CHOSE IN ACTION—COMPANY, 3—CONTRACT, 7.

**VENDOR'S LIEN.**

See VENDOR AND PURCHASER, 2—WILL, 4.

**VERDICT.**

See INTEREST.

**VIS MAJOR.**

See CONTRACT, 6.

**VOLUNTARY EXPOSURE TO RISK.**

See MUNICIPAL CORPORATIONS, 4.

**VOLUNTEER.**

See MUNICIPAL CORPORATIONS, 4.

**WAGES.**

See COMPANY, 2.

**WAREHOUSE RECEIPT.**

See CONTRACT, 9.

**WARRANTY.**

See SALE OF GOODS, 1, 2.

**WATER.**

See SHIP.

**WATER-CARRIAGE OF GOODS ACT.**

See SHIP.

**WAY.**

1. *Easement—Private Right of Way Appurtenant to Land—Extinction by Sale and Conveyance of Servient Tenement for Taxes—Municipal Act, R.S.O. 1897, ch. 223, sec. 2 (8)—Assessment Act, R.S.O. 1897, ch. 224, secs. 7, 149—Method of Assessment—Confirmation by Statute—Sale and Conveyance Declared Valid.*—A right of way appurtenant exists solely for the benefit of the dominant tenement, and apart there-

## WAY—(Continued.)

from has no existence. It is not assessable as a separate interest, nor is it covered by an assessment of the dominant tenement; but the assessment of the servient tenement creates a charge on every interest in the land itself: *vide* the definition of land in clause 8 of sec. 2 of the Municipal Act, R.S.O. 1897, ch. 223; and secs. 7 and 149 of the Assessment Act, R.S.O. 1897, ch. 224, as to exemptions and liens.—Land over which the defendants claimed a right of way was sold for taxes in 1901 and conveyed to the purchaser in 1902:—*Held*, by MULOCK, C.J.Ex., that the taxes assessed against the land became a charge upon that land and every interest in it, including any right of way to which the defendants might have been entitled; and the sale and conveyance of the land for taxes extinguished that right.—*Tomlinson v. Hill* (1855), 5 Gr. 231, *Soper v. City of Windsor* (1914), 32 O.L.R. 352, and *Re Hunt and Bell* (1915), 34 O.L.R. 256, applied and followed.—*Held*, by a Divisional Court (affirming the judgment of MULOCK, C.J.Ex.), that, although the method of assessment adopted may have been wrong yet the assessment having been confirmed and made binding by statute, and an Act having been passed declaring the tax sale and the conveyance made in pursuance of it to be valid, the defendants could not maintain their right to the easement. *A. J. Reach Co. v. Crossland*, 209, 635.

## WAY—(Continued.)

2. *Easement—Private Right of Way over Adjacent Land—Reservation or Exception in Deed of Conveyance — Construction — Ascertainment of Land to which Easement is Appurtenant—Use of Way in Connection with other Lands of Grantor.*—A., being the owner of a block of land, erected thereon three houses, 24, 26, and 28—24 being the most southerly. Houses 26 and 28 were separated from each other by a strip of land, not built upon, having a width of 8 feet 6 inches and extending westerly from the street upon which the houses fronted. In 1912, A. sold and conveyed 26 to the plaintiffs' predecessors; it stood 2 feet 6 inches south of the northerly limit of the land upon which it was built. A. then owned the land adjacent on the north, on which stood house 28, and also the land adjacent on the west, the two together forming an L-shaped parcel of land. In the conveyance to the plaintiffs' predecessors, after the description, were these words: "Together with a right of way for the purpose only of getting in . . . fuel and for the passage of an automobile over the 6 feet adjoining the premises hereby conveyed to the north to a depth of 76 feet . . . and subject to a right of way for the party of the first part"—A.—"and the owners or occupants of the adjacent premises to the north over the northerly 2 feet 6 inches to a depth of 76 feet . . ." The grantees did not execute the con-



**WAY**—(Continued.)

veyance:—*Held* (CLUTE, J., dissenting), that the right of way over the 2 feet 6 inches was, upon the proper construction of the words quoted, limited to the owners or occupants of the adjacent premises to the north, i.e., the parcel on which house 28 stood. *Miller v. Tipling*, 88.

**WHARF.**

See NEGLIGENCE, 1.

**WILL.**

1. *Construction—Devise and Bequest of Real and Personal Property—"Heirs and Assigns"—Estate in Fee Simple in Land—Absolute Interest in Personalty—Application for Order Declaring Construction of Will—Costs.*—Where an estate is devised to the heirs of a person to whom a prior estate of freehold has been given, the heirs take by descent and not by purchase, and an estate in fee simple is created in the ancestor. —*Van Grutten v. Foxwell*, [1897] A.C. 658, followed.—The testator devised and bequeathed "two stores" and half of his other property to his granddaughter "to be held by her during her life and at her death to her heirs and assigns forever:—"*Held*, that the granddaughter took an estate in fee simple in the land devised.—And *held*, that the chattel property bequeathed to the granddaughter became hers absolutely by the terms of the bequest: the testator meant that the land and goods should go in the same manner; and, as the land, by force of the rule of law, became

**WILL**—(Continued.)

the granddaughter's absolutely, so did the goods.—*Comfort v. Brown* (1878), 10 Ch. D. 146, and *De Beauvoir v. De Beauvoir* (1852), 3 H.L.C. 524, applied.—In the peculiar circumstances of the case, no order was made as to the costs of a summary application for the determination by the Court of the questions arising as to the construction of the will. *Re Kendrew*, 185.

2. *Document Propounded as Last Will of Testator—Onus of Proof — Suspicious Circumstances Surrounding Preparation and Execution of Document—Evidence—Finding of Trial Judge in Favour of Will—No Finding upon Question of Discharge of Onus—Appeal — Affidavits Discrediting Important Witness at Trial—New Trial.*—The *onus probandi* lies upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator. Wherever circumstances exist which excite the suspicion of the Court, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will. — *Tyrrell v. Painton*, [1894] P. 151, 157, 158, followed.—In this case

## WILL—(Continued.)

the trial Judge found in favour of the will. Upon an appeal to a Divisional Court, affidavits were filed in which it was stated that the neighbour who had witnessed the will had, since the trial, said things, in the presence of the deponents, which were inconsistent with material parts of his evidence at the trial:—*Held*, by the majority of the Court, that the evidence at the trial shewed that the will was prepared in circumstances which raised a well-grounded suspicion that it did not express the mind of the testator; that suspicion not having been removed, the plaintiffs had not discharged the *onus* which was upon them of satisfying the Court that the document was an expression of the free will of a competent testator; and those opposing probate were not bound to establish fraud. Therefore, the judgment of the trial Judge (who had dealt only with the issue of fraud, and had not determined the question whether the plaintiffs had discharged the *onus*) should be set aside and the action be dismissed, unless the plaintiffs desired a new trial, which in that event should be ordered.—*Per* RIDDELL, J.:—Upon the evidence given at the trial, the judgment should not be set aside; but, in view of the new evidence adduced, which went to discredit an important witness, there should be a new trial, upon which the whole case should be open.—*Per* KELLY, J.:—There should be a new trial for the reasons given by the major-

## WILL—(Continued.)

ity of the Court, and also for the reason given by RIDDELL, J. *Sellers v. Sullivan*, 528.

3. *Due Execution—Testamentary Capacity—Undue Influence—Evidence—Conspiracy—Testimony of Attesting Witnesses—Findings of Trial Judge—Appeal—Costs.*—In an action to establish a will made about a month before the death of the testator, leaving all his property to his wife, whom he had married about 8 months earlier, it was *held*, by CLUTE, J., the trial Judge, that the attempt of the defendant, the sister of the testator, to prove a conspiracy on the part of the plaintiff and her relatives to procure the testator's marriage to her and the making of the will in her favour, failed upon the evidence, as also the attempt to shew that the will was not duly executed, that the testator had not testamentary capacity, and that the making of the will was procured by undue influence. The trial Judge ordered that the will should be admitted to probate and that the defendant should pay the costs of the litigation.—The witnesses to the execution of the will were the plaintiff's brother and another person. The former testified at the trial, but the latter was not called as a witness by either party, although the trial Judge pointed out that he should be called and gave the parties opportunities of calling him after the close of the evidence.—The defendant appealed from the judgment at the trial,

**WILL—(Continued.)**

and the appellate Court, after hearing counsel, deferred the disposition of the appeal until the evidence of this person had been taken. Upon his evidence, when taken, added to the evidence taken at the trial, the Court was of opinion that the judgment of the trial Judge could not be disturbed.—*Held*, that the circumstances of the case made it one of those in which the conscience of the Court should not be satisfied as to the validity of the will until all available evidence, material to the issues between the parties, had been adduced and the plaintiff's claim well-proved.—*Held*, also, varying the judgment below, that the defendant's costs of the litigation and of the appeal should be paid out of the estate of the testator. *Newcombe v. Evans*, 1.

4. *Direction for Sale of Property to Person Named — Security for Payment of Price — Executors — Vendor's Lien.*—A testator by his will directed that his business should be sold and that his brother should "have the privilege of first purchasing the same;" in the event of his purchasing, the stock was to be sold to him at invoice prices, he was to receive the fittings and fixtures free of charge, was to have a year to pay the price, and was to pay a fixed monthly rental for the business premises for one year; after the expiration of the year, the rental was to be fixed by the executors. By a codicil, the testator directed that the

**WILL—(Continued.)**

purchase-price should be paid in monthly or quarterly instalments, and the whole should be paid within one year from the date of the purchase. The brother elected to purchase upon the terms stated in the will:—*Held*, that the executors were entitled to the security of a vendor's lien, and that the purchaser was entitled to take only subject to that lien. *Re Harris*, 476.

5. *Validity — Evidence—Proof of Due Execution and Testamentary Capacity—Failure to Shew that Document Propounded was Expression of True Will of Testatrix—Duty of Solicitor Preparing Will on Instructions of Persons Benefited — Undue Influence of Near Relations—Finding of Trial Judge—Action to Set aside Gifts of Property Made by Testatrix in Lifetime—Relations in Position to Exercise Influence—Presumption — Onus — Parties—Amendment—Addition of Personal Representative.*—The plaintiff, a sister of E.S.; an elderly spinster, who died in April, 1916, brought this action against J. L., another sister, and against the children of J. L., to set aside, on the grounds of want of consideration, the mental incapacity of E. S., and the undue influence of the defendants, a voluntary conveyance of land made to the defendant D. B. L. in 1911, and two gifts of money made respectively to the defendants M. L. and J. L. in 1915. The defendants, in their statement of defence, upheld the conveyance



**WILL**—(*Continued.*)

and gifts, and also set up as the last will and testament of E. S. a testamentary writing executed by her in July, 1913, whereby she devised all her real estate to the defendant D. B. L. and bequeathed her personal property to the defendants. The plaintiff, in reply, attacked the will, upon the same or similar grounds. The will had not been proved. Pending the action the plaintiff was appointed administratrix of the estate of E. S. and added as a party in that capacity:—*Held*, that the defendants had it in their power to exercise a great influence over the deceased, and that the three gifts attacked were obtained when the defendants occupied that position of influence; these transactions, therefore, fell within the rule that where the donee is in a position of confidence or in a position to exercise influence over the donor, it is not necessary to the setting aside of the gift, on the ground of undue influence, that there should be proof of its exercise; undue influence is presumed, and it is for the donee to rebut the presumption; and in this case the defendants had not only failed to rebut the presumption, but had against them the finding of the trial Judge that undue influence was in fact exercised, and that these gifts were the result. Therefore, the gifts could not stand.—*Delong v. Mumford* (1878), 25 Gr. 586, and *Vanzant v. Coates* (1917), 39 O.L.R. 557, 40 O.L.R. 556, followed.—*Held*, as to the will,

**WILL**—(*Continued.*)

that, although (1) mental capacity and (2) due execution were shewn, it was not shewn (3) that the document propounded was understood and appreciated by the testatrix and was in truth and fact the expression of her desire; and these three things must be shewn before the rule laid down in *Baudains v. Richardson*, [1906] A.C. 169, 185, that those attacking the will must shew coercion or fraud, can be applied.—The defendants had, therefore, failed to establish the will.—Review of the authorities.—*Tyrrell v. Painton*, [1894] P. 151, 157, and *Murphy v. Lamphier* (1914), 31 O.L.R. 287, 319, specially referred to. *Wannamaker v. Livingston*, 243.

See CONTRACT, 2, 4.

**WINDING-UP.**

See COSTS, 2.

**WITNESSES.**

See WILL, 2, 3.

**WORDS.**

"*Accident.*"—See INSURANCE, 1.

"*Aid to any Charitable Institution.*"—See MUNICIPAL CORPORATIONS, 2.

"*Charity.*"—See MUNICIPAL CORPORATIONS, 2.

"*Contents.*"—See INSURANCE, 2.

"*Current Contract.*"—See CONTRACT, 8.

"*Due Diligence.*"—See SHIP.

"*Equitable on Facts.*"—See SALE OF GOODS, 1.

**WORDS—(Continued.)**

"*Estimated Value.*"—See INSURANCE, 2.

"*Finally Dispose of the Whole or any Part of the Action.*"—See APPEAL.

"*Fixtures.*"—See MORTGAGE, 2.

"*Heirs and Assigns.*"—See WILL, 1.

"*Judgment not Judicial.*"—See SALE OF GOODS, 1.

"*Labourers, Servants and Apprentices.*"—See COMPANY, 2.

"*Loan.*"—See COMPANY, 1.

"*Mortgage.*"—See VENDOR AND PURCHASER, 2.

"*Occupant.*"—See ONTARIO TEMPERANCE ACT, 2.

"*Private Dwelling-house.*"—See ONTARIO TEMPERANCE ACT, 2.

"*Procure.*"—See CRIMINAL LAW.

**WORDS—(Continued.)**

"*Seaworthiness.*"—See SHIP.

"*Servant.*"—See COMPANY, 2.

"*Shipment Opening Navigation.*"—See CONTRACTS, 5.

"*Terms Usual.*"—See CONTRACT, 5.

"*Verdict.*"—See INTEREST.

"*Warehouse Receipt.*"—See CONTRACT, 9.

"*Wilfully.*"—See FINES AND PENALTIES.

**WORKMEN'S COMPENSATION ACT.**

*Contractor — Assessment — Jurisdiction of Board — Right to Resort to Court*—4 Geo. V. ch. 25, sec. 60 (1).—The judgment of CLUTE, J., 41 O.L.R. 156, was affirmed. *Murphy v. City of Toronto*, 29.





